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AMERICAN CRIMINAL REPORTS

A SERIES DESIGNED TO CONTAIN THE LATEST
AND MOST IMPORTANT

CRIMINAL CASES 85

DETERMINED IN

THE FEDERAL AND STATE COURTS IN THE
UNITED STATES

AS WELL AS

SELECTED CASES

IMPORTANT TO AMERICAN LAWYERS

FROM THE ENGLISH, IRISH, SCOTCH AND CANADIAN

LAW REPORTS

WITH

NOTES AND REFERENCES

VOL. XIV

EDITED BY

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P R E F A C E

The present volume contains one hundred and thirty-seven principal cases while seventy-six cases are given in full in the notes, making a total of two hundred and thirteen cases,—a collection larger than appears in any previous volume.

Although the American Criminal Reports were originally designed to be collections of comparatively late cases, with a few apt notes, we have, in the past few volumes, gone rather extensively into various subjects and reproduced many old English cases, believing that this system would greatly enhance the value of the work. In the present volume, the collections of late cases upon Burglary, Embezzlement, Larceny and Robbery, are preceded by introductory reviews of the respective subjects—thus, adding the feature of a text book to that of a report. On these new features, we would be pleased to receive opinions from our readers, which may assist in guiding our efforts in the preparation of future volumes.

The appearance of this volume has been delayed; but a large collection of cases has been carried over, and volume fifteen is almost ready for the printer.

In closing, we deem it proper to acknowledge very valuable assistance rendered by Mr. W. R. Hall, a law student of the Northwestern University.

J. F. G.

Norwood Park, Chicago.
December, 1908.

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NOTE—The original design of a Table of Topics was to make an index to the principal subjects, appearing in the headlines to reported cases; but considerable difficulty was experienced from the fact that the headlines, having been written by various editors, lack uniformity. The reader should use the General Index in Volume X in connection with this Table.

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AMERICAN CRIMINAL REPORTS

MIDDLETON V. STATE.

80 Miss. 393—31 So. Rep. 809.

Decided April 21, 1902.

ARGUMENT OF COUNSEL: *Impeaching evidence commented upon as proof of the alleged crime—Erroneous instruction based upon a false assumption as to the evidence.*

1. It is reversible error, to permit a prosecuting attorney to comment on impeaching evidence as proof the alleged crime.
2. It is reversible error, to frame an instruction on a false assumption as to the evidence.

Appeal from Circuit Court, Panola County; Hon. P. H. Lowrey, Judge.

Feedy Middleton, convicted of murder and sentenced to be hanged, appeals. Reversed.

Pearson & Lamb, for the appellant.

W. L. Easterling, Assistant Attorney General, for the State.

CALHOON, J. Undoubtedly Middleton shot and slew Ike Jones, who is shown to have been a violent and dangerous character. Middleton presented an application for continuance, based on the absence of an eye witness, which was overruled. We do not pass on this ruling, as the case is determinable regardless of it.

The killing occurred about daylight, and three witnesses for the State made out a case warranting conviction from the shots, and what they heard said by defendant and deceased; but none of them saw the beginning of the trouble. Mack Washington, a witness for defense, testified that defendant Middleton, and Jones, Patterson, Moore, another Middleton, and himself were in his room that night; that among those of the party who went to

sleep at all was the deceased, who awoke in the latter part of the night and said \$8 had been stolen from his pocket, took out his knife, searched the party, and said to Middleton, with an oath that he had it, and if he did not get it he would cut him open. This money, by the way, was found on a window sill, as this witness says, and he, (the witness) sat down on a chair, and was dozing, when he was awakened by quarreling, just outside his door, ran to the door, heard defendant say, "Stand back, Ike; stand back," saw Ike advance on defendant with a drawn knife, whereupon defendant shot at Ike twice in quick succession, and Ike ran, saying, "Don't shoot me any more," and defendant "backed off." On cross-examination the prosecuting counsel, without first fixing time or place, or asking as to the fact, asked this witness whether he had not told a deputy sheriff that he was asleep, and knew nothing about the killing, and also that defendant had said, just before the killing that he was going home and "get his gun and come back and fix Ike."

This question was permitted over objection and exception, and prosecuting counsel was, in due course, permitted, over objection and exception, to contradict this statement by the deputy sheriff, who testified that the witness had told him that. It then develops that prosecuting counsel, in his closing argument to the jury, the court refusing to interfere on objection, used this as a fact proved that the defendant had said these words, and spoke of them as coming "fresh from the lips of defendant himself." He proceeded, "There can be no controversy about that fact, for the defendant's witness told Mr. Rhodes that, just a few minutes before this killing, defendant left his door with the statement that he was going home and get his gun and come back and fix Ike Jones." All this was urged with great eloquence of comment.

We do not think an accused person can be lawfully convicted on what a witness said or did not say, to another person. It needs only to read *Williams v. State*, 73 Miss. 820, 19 South 826, and *Allen v. State*, 66 Miss. 385, 6 South 242, to see a demonstration of these errors on reason and authority. To discredit a witness by showing that he made a contradictory material statement out of court is one thing, and it justifies argument that he is unworthy of belief. But it is quite another thing, and not justified

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to predicate an argument for conviction on the unsworn contradictory statement out of court, in defendant's absence, as if it were a substantial fact proved.

Now the fifth instruction was based on the testimony in chief of this witness, and was designed to emasculate it, and proceeds on the idea that even if the jury believed that Jones did advance on Middleton with a knife, and Middleton told him to stand back, and fired on him, still they should convict, if they further believed that Jones turned at the shot, and fled, and defendant pursued, and when in no danger shot him with deliberate design to kill, and did kill. The giving of this instruction was error, because it is a demonstrable certainty from this record that Jones was killed by the first shot of the pistol, and untouched by the second.

Reversed and remanded.

NOTE (By J. F. G.).—About two years ago the writer had a very pleasant meeting with the writer of the above opinion. In the course of our conversation the subject of argument of counsel was touched upon, and Judge Calhoun remarked, that when, in his earlier days, he was a prosecuting attorney, that he always considered himself as much the counsel for the defendant as for the state. This sentiment should find lodgment in the minds of all public prosecutors; for as their duty consists in the attaining of justice, it is as well performed in favoring the acquittal of the innocent man on trial, as in obtaining the conviction of a guilty man; for in either case justice is attained. Too many follow the erroneous, but popular, notion that their duty is to prosecute all cases coming within their charge with their utmost efforts toward a conviction, and that all matters and testimony tending toward sustaining the defense, must either be brought out by the defendant's counsel, or, be lost to the case. The public prosecutor generally assumes that he is sole representative of the people who has the right to demand a conviction, or a certain kind of a conviction. This assumption is unfounded in law. True, he is the representative of the people in investigating the matter, in instituting and conducting the prosecution and in presenting the testimony to the jury in a proper form at the trial, and, he may in argument draw his conclusions as to the testimony; but the jurors themselves *are the people*, and in that capacity occupy a higher and more important place than the prosecuting attorney. In theory of law, a criminal case is a trial by and before the people, but as it is impracticable for all of the people of the local jurisdiction to attend and participate in each criminal case, and pass upon it, the law provides for the careful selection of twelve good and impartial men, who when selected and sworn, are in contemplation of the law *the people themselves*, while the prosecuting attorney is simply the servant of the people, to bring before

the jury for its impartial consideration the facts of the case, and, in so doing he should endeavor to present all of the relevant facts, whether they indicate guilt or innocence, and in his argument endeavor to draw correct conclusions from the evidence whether such conclusions favor an acquittal or a conviction. His position may at times be a trying one, especially when he is met by a resourceful and aggressive defender, but he should remember that his is a place of duty, and not one of personal display or partizanship, and, that neither the activity of opposing counsel, nor public applause, should prompt him to depart from duty's plain path.

These suggestions find confirmation in the opinion of the Supreme Court of Pennsylvania, in *Commonwealth v. Bubnis*, 197 Pa. St. 542; 47 Atl. Rep. 748, decided January 7, 1901, in which that court while affirming a conviction said:

"The language of the District Attorney, excepted to by the appellant, and made the subject of the sixteenth assignment, was a statement to the jury of the position taken by the Commonwealth. We are not prepared to say that this language, standing alone, would be just cause for disturbing the judgment before us; and it certainly is not when we turn to the record and find that, the attention of the trial judge having been called to it, he said: 'Both counsel state their position from different standpoints; that it is for the jury to pass upon whether the statements of defendant's counsel or the statements of the District Attorney are in accordance with the evidence.' These words of the court made harmless those uttered by the Commonwealth's officer. It may be proper for us to say in this connection that in his official capacity, clothed with the gravest responsibilities, and exercising functions in a measure judicial, the District Attorney should ever be cautious in expressing to a jury his belief in the guilt of the accused. If convinced of it, his duty is to lead them to his own judgment by pointing out to them, intelligently and impartially, the evidence which cannot fairly justify any other conclusion. 'The District Attorney is a quasi judicial officer. He represents the Commonwealth, and the Commonwealth demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the District Attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence he should act impartially. He should present the Commonwealth's case fairly and should not press upon the jury any deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appealing to their prejudices, he is no longer an impartial officer, but becomes a heated partisan.' *Com. v. Nicely*, 130 Pa. St. 261 (18 Atl. 737).

The subject has received considerable attention in notes by H. C. G. in 11 American Criminal Reports, pp. 114-124, where several very interesting cases are reviewed. See also the four cases preceding those notes. See also *Commonwealth v. Oldham*, and notes, 13 Amer. Crim. Rep. 615, and cases at pages 533, 620, 630 and 653 of the same volume.

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POWELL v. STATE.

Texas, Court of Criminal Appeals—70 S. W. Rep. 218.

Decided November 12, 1902.

ARGUMENT OF COUNSEL: *Referring to a contemporaneous and sensational lynching TRIAL: Prejudicial influences arising from intense excitement over another crime, followed by a sensational lynching. Cross-examining the defendant as to previous arrests—INSTRUCTION, as to shooting at alleged adulterer, erroneous.*

1. The defendant was on trial for killing his wife. It was not error to ask him on cross-examination, the following questions "Were you indicted for assault with intent to commit murder?" "Were you indicted for aggravated assault upon your wife?"
2. Defendant was a negro. A few days previous to the trial, great excitement prevailed because of a white woman being ravished by a negro in an adjoining county. After several days search the offender was caught, and within two or three hours after the case was submitted to the jury he was burned to death, by a lawless mob, about six miles from the place of the trial. The capture caused intense excitement, which must have been known to the jury. In his argument, the District Attorney said: "Gentlemen of the jury, if you don't hang this negro, we will have such scenes as we are going to have at Lancing." Notwithstanding the fact, that the court admonished the attorney and advised the jury to disregard the remark, this was held to be ground for new trial.
3. By the law as recognized in Texas, it is not a crime for a husband to kill one whom he discovers in an act of adultery with his wife. In this case the defendant testified to facts, indicating that he fired the fatal shot at one, who at the time, had, or was about to have, his wife in a lascivious embrace, and accidentally shot his wife. This evidence did not justify the court in instructing the jury, that, with a sedate mind and formed design, with express malice, shooting at one person and thereby accidentally killing another, "would not be the first degree, and of no higher offense than murder in the second degree."

Appeal from District Court, Gregg County; Hon. Richard B. Levy, Judge.

Tom Powell, convicted of murder, appeals. Reversed.

T. E. Lacy, J. N. Campbell, J. M. Edwards, and Young & Stinchcomb, for the appellant.

John B. Howard, Claud Pollard, District Attorney, and Robert A. John, Assistant Attorney General, for the State.

BROOKS, J. Appellant was convicted of the murder of his wife, and his punishment assessed at death.

The first bill of exceptions complains that the State was permitted to ask defendant while upon the stand as a witness, "Were you indicted for assault with intent to murder?" to which appellant objected because said testimony was illegal and inadmissible, being irrelevant and immaterial to any issue, and was asked only for the purpose of prejudicing the minds of the jury against defendant, and that the record, if any, showing the same, was the best evidence. The court overruled the objections, and appellant answered, "Yes sir; indicted for assault with intent to murder." There was no error in this. Where appellant takes the stand in his own behalf, it is proper and legitimate to ask him on cross-examination if he has been indicted for a felony. *Brittain v. State*, 36 Tex. Cr. R. 410, 37 S. W. 758; *Williford v. Same*, 36 Tex. Cr. R. 424, 37 S. W. 761.

His second bill complains that the court erred in permitting the State to ask appellant on cross-examination, the following question: "Were you indicted for aggravated assault upon your wife?" to which question defendant answered, "Yes, sir; I was indicted for aggravated assault upon my wife." It is proper on cross-examination to elicit any fact from appellant that goes to show *animus* toward deceased, or motive for the crime. Certainly if appellant admitted an assault upon his wife previous to the murdering of his wife, this testimony would be legitimate, going to show *animus* on the part of appellant toward deceased.

Bill No. 3 complains of the following: "That J. B. Howard, prosecuting counsel, in his opening argument to the jury in said cause in behalf of the State, made the following remarks: 'Gentlemen of the jury, if you don't hang this negro, we will have such scenes as we are going to have at Lancing.'"

The trial court appended the following explanation to the bill: "That the attorney was promptly admonished by the court, and, the jury at once instructed by the court to wholly disregard any statement made by attorney, and to be influenced by nothing except evidence adduced on the witness stand. In this connection the further statement is made concerning the probable influence of the Lancing lynching upon the jury. A white lady

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was outraged by Dud Morgan at Lancing, in Hamilton County,* on Saturday, May 17th, and he escaped arrest. A *posse* of men pursued him, and he was captured in Titus County, at night, on May 21st. Defendant's case was called for trial May 21st at 1:30 p. m., and jurors were examined on *voir dire*, and each juror taken answered that he could and would try a negro with the same degree of fairness and impartiality as he would a white man charged with the same crime. Matters were not in excitement on May 21st. The evidence in the case, as well as the argument of the counsel complained of, and one speech by defendant's counsel, had been concluded when the court at 10 o'clock p. m. adjourned for the night. Up to this time there was no excitement, nor had the rapist been captured. The jury retired for the night in the courthouse. Court convened next morning at 8 o'clock a. m., and argument of counsel at once commenced. The jury received the case and charge of the court about 10:45, and retired in jury room to consider of their verdict. About 10 o'clock it is said great excitement prevailed on streets of Longview over the report that the rapist had been captured and would be executed at 1 o'clock. This excitement consisted in people in crowds leaving town in vehicles, and not in any other sort of demonstration. The courthouse is not on the public square, and any excitement raging on the street of Longview during the time the jury were out in the room could not be seen or heard at the courthouse, nor known of by the jury. When the negro rapist was being executed May 22d, in Hamilton County, Tex., by an outraged citizenship, the jury were in the room, locked from view or hearing. At noon hour the excitement prevailing at Lancing, was confined to Lancing and not known of near or at the courthouse. When the crowds began to return from Lancing, it was about 1:30 p. m., and later, and at that time, to my own knowledge, the jury were in the jury room, where they could neither see nor hear anything from the outside. At 12:30 p. m. the jury ate dinner at a restaurant near the courthouse, and I was present, and no one else was there, and neither was there any

*Later in the opinion it is said that Lancing is "about six miles east of Longview." By consulting a map we find that it is the first railway station east of Longview, and is in Harrison County while Hamilton County is about 195 miles southwest.—J. F. G.

excitement whatever in the restaurant around or about the jury. After the jury were returned to their room, they never came out until about 4 p. m., when they rendered the verdict returned. The remarks of counsel, nor any excitement, did not arouse the jury away from the evidence, nor tend to as a matter of fact."

The record contains the affidavit of seven of the jurors, who state in substance that they were not influenced in the least by the remarks made by the state's counsel.

Attached to appellant's motion for a new trial is the affidavit of R. G. Brown, substantially as follows:

"That on Friday, May 16th, it was circulated over the streets of Longview that a white woman had been choked, robbed and ravished at Lancing, a point about six miles east of Longview, by a negro man, afterwards found to be Dud Morgan. At once a wild excitement began to prevail about the action of Morgan, and posses began to collect in all portions of the country for the purpose of hunting and capturing Morgan,—every one knowing that the capture of Morgan would mean his execution by burning, and that he would be brought back to Lancing, if captured. Numbers of posses were made up in Longview, and went out for the purpose of capturing him; and that posses were made up each day on the streets of Longview from the time of the commission of the crime until his capture, which was made Wednesday night, May 21st. The matter of his capture and expected capture was the sole topic on the streets of Longview, and occupied the time of nearly every one. That the excitement over this was greater than any previous excitement, except the Longview Bank robbery, in May, 1894. That some of the business men quit their business to talk about the matter, and to organize posses and make inquiry about the rapist, Morgan. This excitement continued until information was received of his capture on Wednesday night or Thursday morning; that at once the wildest excitement began to prevail, and to take charge of the citizenship of Longview and the surrounding country including Rusk, Panola, Hamilton, Upshur, and Wood Counties, and other places north, east, west, and south of Longview. It was at once reported that the rapist would be executed by a mob at about noon of May 22d, at Lancing, the place of the commission of the crime, and about six miles east of Longview, thereby making the town of Longview a common center

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and place of gathering and passing through, going to the scene of the execution. That the citizens of various surrounding towns came through Longview on trains, horseback, wagons, carriages, etc., thereby making Longview the central collecting place. That the people came to Lancing in such crowds that it was reported the train arriving at Longview at 11:53 a. m., which usually carried about three coaches for passengers, carried about fifteen coaches, loaded for the execution at Lancing. That the through train from west to east through Longview about 12 o'clock only stopped at large places; that the train was so crowded with citizens from surrounding towns, when it stopped at Longview, the traveling engineer reported to the management of the company it would be best to stop both 'cannon balls' at Lancing, a place where they had never stopped before, it being only a siding, or that some serious trouble might be resorted to to stop them. That said trains have been operated over the railroad a long time, and had never stopped there before, but on account of the execution of the rapist and intense excitement were compelled to stop. That between 12 and 1 o'clock on May 22d, a crowd of about 1,500 or 2,000 men made haste for Lancing, at which place the rapist, Dud Morgan, had been carried, and there executed by burning him, which created an excitement all over the surrounding country, and more especially was it created in Longview, from the nearness of the place thereto. That the case of the *State of Texas vs. Tom Powell*, charged with murder, went to trial in the District Court of Gregg County on May 21st, and proceeded until May 22d, at about 11 o'clock, at which time the evidence and arguments in the case were concluded, and the judge delivered the jury his charge. That upon the delivery of the charge a number of the male citizens of Longview began to leave to go to Lancing to see the execution of Dud Morgan. That affiant believes the jury were cognizant of all this,—about a great crowd going to Lancing to see the execution. That between 12 and 1 o'clock affiant met the jury in charge of the deputy sheriff on the streets of Longview, and that some one of the jury or the sheriff stopped him, and asked him about the execution that was going to be had at Lancing, and that affiant told them about 1,500 or 2,000 men were out there at Lancing, executing Dud Morgan by burning him, and that

the jury showed intense interest in the report given of the execution. That every citizen of Longview and surrounding vicinity that affiant had heard speak of the probable execution of Dud Morgan before his execution had expressed their approval of the same, and did not criticise the action of the crowd in their action in executing him. That the defendant, Tom Powell, is a negro, and was on charge of wife murder, and that the rapist was a negro, and was on trial at Lancing for rape, and was executed by burning, and that, the defendant being a negro on trial for wife murder, affiant believes the excitement and surroundings of Dud Morgan, being executed in the manner in which he was, was justly calculated to prejudice the minds of the jury against defendant, Tom Powell. Affiant says that after the jury received the charge and a few minutes before 12 o'clock, he was in the courthouse, and heard the sheriff report to the court that the jury would have a verdict in about five minutes; that a very few minutes thereafter the jury went to dinner, and during the dinner hour affiant had the conversation hereinbefore mentioned, and the jury then went back to the courthouse, and deliberated with their verdict until about five o'clock, at which time the jury rendered a verdict giving defendant the death penalty."

In view of the extraordinary state of affairs shown by the judge's qualification to the bill, as well as the affidavit above copied, we cannot say that appellant was not injuriously affected in his rights. This is a death penalty, and appellant is entitled to a fair and impartial trial by a cool and calm consideration of all the salient features of his case, unhampered by any prejudice, personal or local. So believing, we think the court erred in refusing to grant a new trial.

In view of another trial, we deem it proper to comment upon one clause of the charge of the court, though not excepted to by appellant either by bill or in motion for new trial. The charge referred to is as follows: "If you believe from the evidence beyond a reasonable doubt that defendant, Tom Powell, did unlawfully shoot at Dood Bryant with a pistol, and that said shooting at Dood Bryant was with a sedate mind and formed design, upon express malice, to kill Dood Bryant, and that in attempting to shoot and kill Dood Bryant defendant shot and killed Lydia Powell, and that defendant had no intention

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or design at the time to kill her, then such killing would not be of the first degree, and of no higher offense than murder in the second degree." Under the facts of this case, we do not think this charge is correct. The evidence presenting the issue of shooting at Dood Bryant was the testimony of appellant, whereby he states facts indicating that he shot at Dood Bryant, who had his wife in a lascivious embrace or was about to have her in such embrace, and, exasperated by such outrage and contemplated adultery with his wife, he shot at Bryant, and accidentally killed his wife. The law of this State is, if appellant shot at Bryant under such circumstances as his testimony indicates, he would not be guilty of any offense whatever if he had killed him; the law justifies him in so doing. Then, if he would not be guilty of any grade of homicide in killing Bryant when caught in adultery with his wife, the accidental killing of his wife in attempting to kill Bryant would not make him guilty of any offense. It is true, as indicated by the learned trial court, if appellant shot at Bryant, actuated by express malice, and killed another by accident, under ordinary conditions he would be guilty of murder in the second degree. But the facts in this case do not present that issue. We have animadverted upon this charge in view of another trial, and would suggest that it would be better to present the law applicable to the facts as indicated. We note that a correct charge upon this matter is presented in a subsequent portion of the charge; hence the charge quoted should be eliminated upon another trial.

We do not deem it necessary to discuss other questions raised.

The judgment is reversed, and the cause remanded.

KNOX v. STATE.

112 Ga. 373—37 S. E. Rep. 416.

Decided November 30, 1900.

ARGUMENT OF COUNSEL: *Comment of failure to call the accused's daughter as a witness*; PRACTICE: *Statement of the accused*.

1. Since the law does not give to the accused in a criminal case any right to make a second statement to the court and jury, a refusal to allow such privilege is not cause for a new trial, even where the State,

after the accused made his statement, introduced additional evidence strengthening its case.

2. Mere failure by one on trial for crime to call and examine as a witness his daughter, who was shown to have been present at the commission of the alleged offense, could, in no event, raise a presumption against the accused that the daughter would, if introduced, testify unfavorably to him, when it affirmatively appeared that she was a "little girl," and did not appear that she was of sufficient age to be a competent witness. In the absence of any evidence upon this point, the failure to call and examine her was not a legitimate subject-matter of argument before the jury.
3. The erroneous ruling in the present case that the argument relating to failure to call a witness was proper was not cured by the charge given in this connection.
(Syllabus by the Court.)

Error from Superior Court, Franklin County; Hon. R. B. Russell, Judge.

Ed. Knox, convicted of murder, brings error. Reversed.

W. R. Little and *G. McCurry*, for plaintiff in error. *C. H. Brand*, Solicitor General, and *J. M. Terrell*, Attorney General, contra.

LEWIS, J. The accused was tried and convicted in the Franklin Superior Court on an indictment charging him with the offense of murder. He was found guilty with a recommendation to life imprisonment; whereupon he moved for a new trial, and excepts to the judgment of the court overruling the same.

1. One ground in the motion for a new trial is that the court erred, after the accused had made his regular statement to the jury in his defense on the trial and closed, in refusing to let him go back upon the stand the second time to rebut the testimony of a witness who swore, after the State had closed, and after defendant's statement, that defendant came to the house of witness after the killing, and he said he had killed "Julesomebody for twenty cents"; that she was not related to Jule Thompson (the deceased). The question as to whether or not one on trial for a criminal offense, as a matter of right, can make a second statement, is no longer an open one before this court. It was decided that the accused has no such right in the case of *Vaughn v. State*, 88 Ga. 732, 16 S. E. 64. In *Boston v. State*, 94 Ga. 590, 21 S. E. 603, it was decided: "It is not matter of right for the accused to make a second statement to

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the court and jury because the State has introduced additional evidence which strengthens the case against him." See, also, *Sharp v. State* 111 Ga. 176, 36 S. E. 633.

2. Another ground in the motion is that the court erred in this: "While the Solicitor-General was making his argument in conclusion to the jury, he called their attention to the fact that the defendant's own daughter, Marie Knox, a little girl, was present at the homicide, and that, inasmuch as the defendant had failed to introduce her as a witness, they should take that as a powerful circumstance against him, and should convict. Whereupon defendant's counsel duly objected to such argument as being unauthorized and improper, and asked the court to disallow the same, and the court allowed said argument to stand, and allowed the Solicitor General to continue his argument at length on this line." We think that under the facts developed by this record, the comment on failure of the accused to bring his little girl into court as a witness to sustain his defense was not a legitimate subject-matter of argument before the jury, and that the court erred in not promptly correcting the Solicitor-General when objection was made to such argument by counsel for the accused. The evidence tended to show that this was a little girl. There was not a particle of evidence to show that she was at all competent as a witness. Mere failure to call and examine such a person, who was present at the commission of an alleged offense, is not sufficient to raise the presumption against the accused that this person, if introduced, would have testified unfavorably to him. It should further appear that such a person was a competent witness.

3. Another ground in the motion sets forth the following written request, which the court gave in charge to the jury: "In reference to some of the points alluded to in the argument, I charge you that there is no evidence before you that the girl alluded to in the argument is a competent witness; and, if a competent witness, either party has a right to introduce her as a witness; and the fact that the defendant did not introduce her testimony should have no weight with the jury in determining the guilt or innocence of the defendant." Complaint is made that the court added to that request the following: "And, though the general rule is, where a party has evidence in his power by which he may repel or rebut a charge or claim

against him, and fails to do so, and swears in that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded, this presumption may be rebutted, even by circumstances coming under your knowledge and observation in the course of the trial." We do not think the erroneous ruling in the present case was by any means cured by giving this request of defendant's counsel afterwards to the jury, and especially not by adding thereto the charge last quoted, which we fear was calculated to confuse the jury upon the subject.

There are other grounds in the motion for a new trial, but they are not of sufficient merit to require consideration. The judgment of the court refusing a new trial is reversed because of the error set forth in the second headnote.

Judgment reversed. All the Justices concurring.

SIMMONS, C. J. I concur in the judgment of reversal, for the reasons given by me in my dissenting opinion in the case of *Railroad Co. v. Morrison*, 102 Ga. 327, 29 S. E. 104.

LITTLE, J. I concur in the judgment rendered in this case; but for reasons which are altogether different from those assigned in the opinion of the court as well as those given by the Chief Justice. It is altogether legitimate, I think, for the State's counsel, in presenting to the jury, in the trial of one charged with crime, his reasons why a verdict of guilty should be returned, to comment on the fact that the evidence introduced showed that a particular person was present at the time it is alleged that the offense was committed, and was, therefore, acquainted with the facts which it is alleged constitute the offense, which person, by reason of age and relationship, is peculiarly under the control of the accused; that the evidence showed such person to be accessible; and that she was not produced as a witness;—not for the purpose of contending that the accused should be convicted because of the non-production of the witness, but on the line that the evidence, if presented, might make plain any fact left in doubt by the evidence introduced; and that the withholding of such evidence is a circumstance which the jury might consider in determining the weight or truth of certain evidence produced. The argument of counsel and his reasons are not obliged to be accepted by the jury. There is

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nothing authoritative about the argument. At the most, it is only persuasive. It is supposed to be reasoning on the law and the facts to assist the jury to arrive at the desired result, the truth. And while the accused must not, in any case, be convicted on account of the absence of evidence which could be produced, it is, nevertheless, a fact that the evidence produced is frequently weakened, to a certain extent, at least, when it appears that there was other evidence bearing on the facts in issue accessible to the party which he deliberately failed to bring into court. And while a conviction can only legally be had when it is the result of competent evidence, yet when it is proved that there is other evidence in the control of the accused, which would, if it had been introduced, explain any doubtful question at issue, the fact that there is other evidence is one of the facts in the case, and, as such, counsel has a right to comment on its absence, and to draw inferences thereon. But if, in doing so, he seeks to have the jury draw unauthorized conclusions, the judge should, in the interest of a fair trial, so charge the jury in relation thereto as to protect the rights of the accused; and, when properly requested, I think he is legally bound to do so.

In this case, after giving a written request, the judge charged the jury as follows: "And though the general rule is, where a party has evidence in his power by which he may repel or rebut a charge or claim against him, and fails to do so, and swears in that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded, this presumption may be rebutted, even by circumstances coming under your knowledge and observation in the course of the trial." This charge, I think, was error. While presumptions arise under certain proved facts that a criminal charge against the accused is well founded, such presumption can never arise except from proved facts: and the principle given to the jury is, in my opinion, entirely inapplicable to criminal cases. In effect, it tells the jury that, if the defendant had evidence by which he might repel or rebut the charge, and fails to introduce it, the presumption then arises that he is guilty. This violates the fundamental principle of criminal law that the guilt of the accused must be shown by competent evidence before a conviction can be legally had. One accused of crime has a right to stand mute, and, unless it affirmatively appears by the evi-

dence that he is guilty, he cannot so be legally held. The presumption of law is that he is innocent, and this presumption remains until he is proved to be guilty. While these principles are true and sound, they do not contravene, as I think, the right of counsel to comment on the fact that the defendant, according to the evidence, is withholding a witness who might make plain something which is doubtful; and this fact goes to the jury, with others, as part of the evidence, and may explain, add to, or detract from the facts to which other witnesses have testified.

NOTE.—Comments by prosecuting attorney on the defendant's failure to introduce evidence of good character, in *Cline v. State*, 71 S. W. Rep. 23, decided December 12, 1902, in reversing a conviction the Criminal Court of Appeals of Texas, said:

"Appellant also reserved a bill to the remarks of the District Attorney in his closing argument. These remarks were as follows:

"That defendant had not proven that his reputation for being peaceful was good. The fact could be presumed that his reputation could not be shown to be good. Could it have been shown to be good defendant's able and energetic counsel would have shown it; and that, from the fact that it could not be shown to be good, he had a right to presume that the reputation of the defendant was that of a violent and dangerous man."

"This was excepted to, but there was no request to instruct the jury to disregard said argument. All the authorities hold that it is not competent to put a defendant's reputation in evidence unless he takes the initiative and does so himself. If his character cannot be assailed by testimony without his consent, much less should it be assailed in the argument in the absence of testimony. These remarks should not have been indulged in.

"For the errors discussed, the judgment is reversed and the cause remanded."

DAVIS V. STATE. •

Texas, Court of Criminal Appeals—55 S. W. Rep. 340.

Decided January 24, 1900.

ARGUMENT OF COUNSEL: *Reflections on counsel for the accused.*

INSTRUCTIONS: *An instruction on circumstantial evidence necessary when the proof shows the recent possession of stolen property—When an instruction on "accomplice testimony" is unnecessary.*

1. "Where the State relies alone on possession of recently stolen property, a charge on circumstantial evidence should be given."

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2. When the testimony does not show a witness to be an accomplice, a charge on testimony by an accomplice, need not be given.
3. It was reversible error to permit the District Attorney to state in his argument to the jury, that the counsel for the accused, a county judge, cared nothing about the cost of criminal trials, and was willing to bankrupt the county, if it could be said that none of his clients were convicted, etc.

Appeal from District Court, Jefferson County; Hon. Tom C. Davis, Judge.

Selestian Davis, convicted of cattle theft, appeals. Reversed.

George C. O'Brien, for the appellant.

Robert A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of cattle theft. The State relies upon possession by appellant of recently stolen property. Appellant defended upon the theory of purchase. The court failed to instruct the jury in regard to the law applicable to circumstantial evidence, and the necessary corroboration of accomplice's testimony. Appellant requested, in writing, charges upon both issues, which were refused, and he reserved his exceptions. Where the State relies alone on possession of recently stolen property, a charge on circumstantial evidence should be given. This character of evidence has always been held by this court to be circumstantial. The failure of the court to give this charge requires the reversal of this case.

We deem it unnecessary to collate or discuss the testimony which it is claimed tends to show that Patillo may have been an accomplice. Suffice it to say that, after a careful review of the testimony, we do not believe it suggests that theory. The court did not err, therefore, in refusing to charge with reference to accomplice testimony.

There are sundry bills of exception reserved to the rulings of the court and the argument of the prosecuting attorney. Some of the bills with regard to the admission and rejection of testimony are rather indefinitely framed, and as presented, in our opinion, show no cause for reversal. Some of the remarks of the District Attorney were outside the record, and, in our opinion, injurious to appellant. The court should have promptly repressed such argument. For instance, bill No. 12,

among other things, recites (referring to counsel for appellant): "Does George think there is a man on this jury to hang it? He is County Judge. He cares nothing about the expense entailed upon the county by reason of hanging juries. He does not give one scintilla, so long as it is said, 'George O'Brien's client cannot be convicted in Jefferson County.' He is very uneasy about the county, but is willing to bankrupt it, if necessary, to get a man or two on the jury to hang it and defeat justice. He would have you violate your oaths, stultify your consciences, turn a cow thief loose upon society unwhipped of justice,—yes, anything,—in order that it can be said, 'A man cannot be convicted in Jefferson County if George O'Brien defends him.'" Other bills of exception contain remarks of similar character. Trial courts should not permit such arguments. The appellant is entitled to a fair trial, without reference to such outside influences as discussed by State's counsel. It would seem to be an easy matter, even in an exciting criminal trial, for attorneys to keep within the record, and discuss the issues suggested by the evidence.

The judgment is reversed, and the cause remanded.

STATE V. DEVES.

9 Kan. App. 886—61 Pac. Rep. 511.

Opinion filed June 18, 1900.

ARGUMENT OF COUNSEL: *Reference to defendant's failure to testify. Insufficiency of the testimony.*

1. During the closing argument, the Assistant Prosecuting Attorney in answer to an objection made to his argument, remarked that he was not referring to the fact that the defendants did not testify. Held, to be a prejudicial comment on their failure to testify.
2. Testimony reviewed and held to be insufficient.

Court of Appeals of Kansas, Northern Division.

Appeal from Dickinson District Court. Hon. O. L. Moore, Judge.

Charles Deves convicted of illegal sale of liquors, appeals. Reversed.

R. H. Kane and W. S. Roork, for the appellant.

S. S. Smith and Allen & Towner, for the State.

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PER CURIAM. The appellant, Charles Deves, was charged, jointly with one Anthony King, with the unlawful sale of intoxicating liquors upon two counts, and in a third count with maintaining a nuisance, under the prohibitory liquor law. His co-defendant, King, was acquitted, and the appellant was found guilty upon the second count of the information, and acquitted upon the first and third. His motion for a new trial was overruled. The only evidence which in any manner tends to support the verdict was that of one L. E. Humphrey. This witness testified that for 15 years he resided in the town of Chapman, where the offence was alleged to have been committed; that he was acquainted with the defendants; that he saw them on the 18th day of October, 1899, in their place of business; that he purchased from them one half pint of whiskey for the sum of 25 cents. There is no detailed statement as to what, if anything, the appellant did in connection with this sale of liquors. The testimony is wholly insufficient to support the verdict.

During the closing argument of counsel for the prosecution the assistant prosecutor made some statements to which the defendant excepted; whereupon the attorney stated, "I was not alluding to the failure of the defendants to take the stand," or, as stated by other witnesses, "I was not referring to the defendants' not testifying." The attorney who made the closing argument for the prosecution says that in his address to the jury, among other things, he said: "Why didn't the gentlemen bring forward witnesses to impeach the old man? Why didn't they [meaning the lawyers for the defendants] deny it [meaning, why didn't the lawyers deny that the old man, Sage, was an honored and respected citizen, whose character and reputation was good and above reproach, by putting witnesses on the stand who would impeach his general reputation for truth and veracity]?"—at which time counsel for defendants took exception to his remarks, and he immediately addressed the court as follows, "I was not referring to the defendants' denying it." Neither of the defendants testified upon the trial.

Section 218 c. 102, Gen. St. 1897, provides: "The neglect or refusal of the person on trial to testify, or of a witness to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall the circumstances be referred to by any attor-

ney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." Any reference by an attorney prosecuting in a criminal case, in his address to the jury, to the fact that defendant has neglected, failed, or refused to testify, constitutes misconduct. A party lawfully before the court for trial upon a criminal charge is entitled to a fair trial under the forms of law before he may be convicted. For the reasons hereinbefore stated, defendant is entitled to a new trial, and the court erred in overruling the motion for a new trial. The judgment is reversed, and case remanded for a new trial.

JACKSON V. STATE.

45 Fla. 38—34 So. Rep. 243.

Decided March 24, 1903.

ARGUMENT OF COUNSEL: *Comment on the failure of the accused to testify.*

1. Chapter 4400, of the Acts of 1895, forbids the State's counsel to comment on the failure of the accused to testify in his own behalf. Such comment constitutes reversible error, even though it be made in disclaiming the intention to argue certain conclusions therefrom, and not in urging such argument.
(Syllabus by the Court.)

Error to Criminal Court for Hillsborough County; Hon. Walter S. Graham, Judge.

Will Jackson, convicted of burglary, brings error. Reversed.

Wall & Hampton, for the plaintiff in error.

William B. Lamar, Attorney General, for the State.

MAXWELL, J. The plaintiff in error upon his trial in the court below for burglary, did not testify as a witness. A State witness had identified him when brought before her as the man whom she found in her room at night, and testified to the fact upon the witness stand. Commenting upon this testimony, the attorney assisting the State in the prosecution in his argument to the jury said: "There was no denial of that accusation then, and there is none now." This was objected to by the defendant's counsel as in violation of the provision in chapter 4400, p. 162, Acts 1895, that no prosecuting attorney

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shall "be permitted before the court or jury to comment on the failure of the accused to testify in his own behalf." This objection was sustained as to the words "and there is none now," whereupon the attorney for the State disclaimed any intention of referring to the failure of the defendant to testify, and, against the objection of the defendant's counsel, was permitted, at some length, to make an explanation of his position to the jury, in which, among other things, he said: "I do not mean for one moment to contend before you that I have the right to argue to you that you should convict this defendant because he has not seen fit to become a witness in his own behalf, * * * how in the next breath could I have meant to convey to your minds that you were to be prejudiced against this defendant, or that you were to find him guilty, or even to consider it as an element of guilt that he did not go upon the witness stand?"

The effect of this was to call to the attention of the jury the fact that the failure of the defendant to testify might be used as an argument along the various lines suggested, and while the reference thereto was made in good faith in negating such a purpose, rather than in pursuing it, it was none the less violative of the statute above mentioned. The prohibition of the statute is not limited to philippics against the prisoner based upon his failure to testify, but extends to any comment upon such failure. There may be some circumstances where reference to the fact may be made in such form as not to constitute reversible error, as in the case of *State v. Mosley*, 31 Kan. 355, 2 Pac. 782, but the remarks made in this case are not of that character. *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650; *State v. Holmes*, 65 Minn. 230, 68 N. W. 11; *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *Yarbrough v. State*, 70 Miss. 593, 12 South. 551; *Reddick v. State*, 72 Miss. 1008, 16 South. 490; *Watt v. People*, 126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403; *State v. Graham*, 62 Iowa, 108, 17 N. W. 192; *Ruloff v. People*, 45 N. Y. 213; *State v. Balch*, 31 Kan. 465, 2 Pac. 609; *Hunt v. State*, 28 Tex. App. 149, 12 S. W. 737, 19 Am. St. Rep. 815, criticised in *Parker v. State*, 39 Tex. Cr. R. 262, 45 S. W. 812.

The error was not, as some courts hold may be done, cured by instructions from the court, but defendant's objection was overruled, and the remarks held to be proper.

For this the judgment must be reversed, and the cause remanded for a new trial.

IVEY V. STATE.

113 Ga. 1062—38 Chicago Legal News 38—39 S. E. Rep. 423.

Decided July 23, 1901.

ARGUMENT OF COUNSEL: *Prejudicial remarks—Review of authorities. Error in refusing to grant a mistrial.*

1. The State, as an accuser in a criminal proceeding, does not seek one of its citizens convicted unless the evidence shows his guilt beyond a reasonable doubt; nor will it permit its prosecuting officer to use any unfair means in the trial, or illegal argument in his address to the jury, to the prejudice of the accused. Where, therefore, a Solicitor General, in his address to the jury, uses highly improper language, not authorized by the evidence, or any fair deduction therefrom, and the counsel for the accused objects thereto and moves the court to declare a mistrial, which the court refuses, and exception is taken to the ruling, this court will reverse the judgment, and grant a new trial, in the interest of justice and of fair and impartial trials.
(Syllabus by the Court.)

Error from Superior Court, Whitfield County; Hon. A. W. Fite, Judge.

Elizabeth Ivey, convicted of selling liquor without a license, brings error. Reversed.

Jesse A. Glenn and Geo. G. Glenn, for the plaintiff in error.
Sam P. Maddox, Solicitor General, for the State.

SIMMONS, C. J. The record discloses that Mrs. Elizabeth Ivey was tried and convicted for the offense of selling intoxicating liquor without a license. She made a motion for a new trial, which was overruled by the court, and she excepted. From her motion it appears that the Solicitor General, in his address to the jury, used the following language: "Gentlemen of the jury, I want you to stand by me, and help me break up this vile den;" and: "Gentlemen of the jury, if you could go over this town, and see the good mothers whose pillows have been wet with tears over their boys who have been intoxicated by the acts of this woman." Defendant's counsel objected to these remarks as being highly improper and without evidence to authorize them,

and asked the court to declare a mistrial on account of them. This motion the court overruled, simply remarking, "Go on with the case, and confine your argument to the facts in the case." The motion for a new trial complains of the refusal of the court to grant a mistrial as asked. We think that the ruling complained of was erroneous. While the State is the accuser in every criminal case, it does not seek the conviction or punishment of any one of its citizens unless the evidence shows beyond a reasonable doubt that he is guilty. An officer is appointed to represent the State in the courts, and it is his duty, when the evidence shows or tends to show the guilt of one on trial for crime, to argue to the jury that the evidence is sufficient to authorize a conviction, and that the jury should return a verdict of guilty. The State, however, will in no case permit its representative to go outside of the evidence to find a basis for appealing to the sentiments, passions, or prejudices of the jury in order to obtain a conviction. *Jesse v. State*, 20 Ga. 169. The Solicitor General, appointed to represent the interest of the State in the trial of offenders, does not occupy the position of counsel generally. His duty does not require him to insist upon the conviction of the accused unless the evidence is sufficient to authorize it. His office is *quasi* judicial, and, while it is his duty, if he honestly believes that the evidence shows the guilt of the accused, to insist upon this view before the jury, and to use in his argument all his ability and skill in presenting the case as made by the pleadings and the evidence, still it is under no circumstances his duty either to go outside of the case and state facts not in evidence, or to appeal to the passions or prejudices of the jury. The motion for new trial shows that the Solicitor General stated as facts things to which no witness had testified,—that good mothers had wet their pillows with their tears over their boys who had been intoxicated by the acts of the accused. These remarks were not warranted by the evidence, and were plainly calculated to prejudice the accused. While, as before remarked, the State is the accuser in criminal cases, it will not permit its representatives to use unfair means against the accused, pending the trial, or to comment upon facts not put in evidence, or to make remarks calculated to prejudice the accused in the minds of the jurors. This is not a new question in this court. Similar conduct was condemned by this court, in no

uncertain terms, in the case of *Berry v. State*, 10 Ga. 522. In *Mitchum v. State*, 11 Ga. 615, where the court had refused to restrain the Solicitor General from commenting on facts not in evidence, Nisbet, J., said, in reference to the habit of counsel, in addressing the jury, of going outside of the evidence, and commenting on facts not growing out of the evidence or the pleadings: "We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal, and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments; and in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial."

In *Forsyth v. Cothran*, 61 Ga. 278, this court approved the grant of a new trial by the lower court upon this ground. In *Augusta R. Co. v. Randall*, 85 Ga. 297, 315, 11 S. E. 706, this court granted a new trial in a civil case, because counsel for the plaintiff, in his concluding address to the jury, stated facts which were not in evidence, and inferences which could not be deduced from anything properly in the case. In *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 22 Am. St. Rep. 465, a new trial was granted because the trial judge allowed the Solicitor General to argue, over objection, that the accused was of bad character, when there was no evidence of such character. In *Washington v. State*, 87 Ga. 12, 13 S. E. 131, in which the accused was tried on a charge of arson, it was held that it was error to allow the Solicitor General, over objection of defendant's counsel, to state that frequent burnings had occurred throughout the country, and to urge the jury, in consequence thereof, to strictly enforce the law in the case then on trial. In that case a new trial was granted. In *Johnson v. State*, 88 Ga. 606, 15 S. E. 667, a new trial was granted because the Solicitor General was allowed, over the objections of the counsel for the accused, to argue to the jury that the failure of the counsel for the accused to examine the State's witnesses concerning a fact which the court had ruled to be inadmissible was an admission of such fact; and also that the failure of the accused to introduce these witnesses as his own amounted to such an admission. Mr. Justice Lumpkin, speaking for the court, said: "We feel constrained to grant the

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accused another hearing. The conclusions drawn * * * from the premises stated were unauthorized, and were highly injurious to the accused." In some of the foregoing cases it does not appear that any objection was made in the lower court to the improper language, or that any motion for a mistrial was made on account of it. The rule which now prevails in this court is, that a new trial will not be granted upon such grounds unless objection is made by counsel for the accused, and some ruling invoked thereon in the court below. *Farmer v. State*, 91 Ga. 720, 18 S. E. 987. In the case of *Bowens v. State*, 106 Ga. 760, 764, 32 S. E. 666, 667, Mr. Justice Lumpkin lays down the rule as follows (with numerous citations of the decisions of this court): "Where counsel make unauthorized and improper statements in their arguments before juries, opposing counsel should call attention to the same, and either move for a mistrial or request the court to instruct the jury to disregard such statements." Even in cases where this court has refused to grant a new trial on this ground, because of the failure to invoke a ruling in the court below, and make the point properly, it has almost invariably condemned the practice of commenting on facts not in evidence, and making improper remarks to the jury. In the present case the Solicitor General made statements to the jury which were highly improper; the court failed to rebuke him, or to charge the jury with reference to the matter, and refused to grant a mistrial when asked so to do by the counsel for the accused. Under these circumstances, and the doctrine announced in the above-cited cases, we feel constrained to grant a new trial upon this ground. It may be that the accused was guilty of the offense charged, but certainly she cannot be said to have had a fair and impartial trial, and, in the interest of impartiality and of justice and of the dignity and decorum of the courts, a new trial should be had.

Judgment reversed. All the justices concurring.

NOTE (by J. F. G.).—When placed in jeopardy, a defendant is entitled to a speedy termination of the case, and, on this right he may stand without waiving any material errors occurring at the trial. Otherwise, a public prosecutor failing in his proof could by flagrant misconduct in his argument, force a continuance, and, renew the prosecution of the case under more favorable circumstances.

OWENS V. COMMONWEALTH.

22 Ky. Law Rep. 514—58 S. W. Rep. 422.

Decided September 21, 1900.

ARGUMENT OF COUNSEL: *Acrobatic forensic eloquence*; DYING DECLARATIONS: *Test and Weight*; INVOLUNTARY MANSLAUGHTER: *When instruction may be refused*.

1. Mental capacity to testify is a test for a dying declaration; but the weight of the declaration is with the jury.
2. The accused's testimony indicated self-defense, and the blow was intentionally given. The mere fact that the accused assisted the deceased to arise after he had been struck did not entitle the accused to an instruction on involuntary manslaughter.
3. The mere fact that the Prosecuting Attorney while addressing the jury was permitted to cast himself on the floor and halloo in loud tones, though unusual, is not reversible error.

Appeal from Laurel Circuit Court.

Daniel Owens, was convicted of homicide, appeals. Affirmed.

H. C. Hazelwood, for the appellant.

Robt. J. Breckinridge and *Clem J. Whittemore*, for the Commonwealth.

PAYNTER, J. The evidence in this case justified the jury in its conclusion that the appellant followed the deceased, Herman Smith, assaulted him, not in his necessary or apparently necessary self-defense, and inflicted a wound from which he died. The appellant sought an acquittal upon the grounds of self-defense, and the testimony which he offered was for the purpose of establishing that defense.

It is insisted that an instruction ought to have been given on involuntary manslaughter, because the appellant assisted the deceased to arise after he had been knocked senseless by him. If the circumstances under which he struck the deceased are such as detailed by him, he was excusable for the killing on the ground of self-defense. Although the appellant may not have intended to kill the deceased by the blow which he inflicted, but only to injure him, still, if he struck it when there was no necessity or apparent necessity for doing so to save his own life, it cannot be said that he was guilty of involuntary manslaughter.

To make a dying declaration of any value, the party making it must have been mentally capable of testifying. The jury heard

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the evidence as to the mental condition of the deceased, and it was the judge as to the value that should be given to the testimony of those who testified as to his dying declaration. Dr. Scales was not present when the dying declaration is claimed to have been made, and his evidence was of little value as to whether or not the deceased may have had a lucid interval at the time he made it. It is insisted that the testimony of Juda Smith was incompetent in proving the dying declaration, because she testified to that which was the mere opinion of the declarant. It is true that the dying declaration is admissible only when it relates to the immediate circumstances of the transaction resulting in the injury, not to the opinions of the one making it. After she had given the statement of the deceased as to how he was pursued by the appellant and struck with a rock, and then struck on the head with a billet of wood, she further said that the deceased had said that the appellant had "beat him all he wanted to, and that he did not remember anything after Owens hit him in the head." The latter part of the statement, to the effect that he did not remember anything after Owens hit him on the head, simply shows that the defendant's conclusion that Owens had beat him all that he wanted to was without any value. If the deceased did not remember anything after he was struck on the head, he could not have known whether Owens had beat him all that he wanted to or not. Taking the whole statement together, it shows that the deceased was knocked senseless by the blow on the head, and that the balance of the statement was a mere conclusion, without a knowledge of any facts on which to base it. This the jury could readily see, and could not have been misled by it; or prejudice the rights of the appellant.

We have examined the instructions given by the court, and are of the opinion that they state the law of the case.

One of the attorneys for the Commonwealth during his argument laid down upon the floor, and hallooed at the top of his voice, "Dan Owens, come here, and strike me with that club," and called upon others to come and strike him with a "board heart." This was an unusual position for counsel to assume in arguing to a jury, still the court cannot attempt, in a matter of that kind, to regulate counsel in his effort to demonstrate a proposition, or to call vividly before a jury facts which he believes the testimony establishes. The court cannot regulate

counsel in the argument of a case in the manner of gestures and attitudes, nor direct when he shall modulate his voice or increase its tone.

We do not believe that any error was committed at the trial prejudicial to the substantial rights of the appellant.

The judgment is affirmed.

STATE V. TUTEN.

131 N. C. 701—42 S. E. Rep. 443.

Decided September 16, 1902.

ARGUMENT OF COUNSEL: *Remarks not supported by, but foreign to the evidence, implying that the accused was responsible for a homicide, not under inquiry—The law, and not the presumed intelligence of the jury, is the test as to whether improper remarks are prejudicial and reversible error.*

1. On his trial for illegal selling of intoxicating liquors the accused admitted that he had been charged with the homicide of one John Cayton and committed to jail upon the finding of the coroner's jury; but stated that he did not have an opportunity to be, and was not, at the inquest, and, that the grand jury ignored the charge against him. In his address to the jury, the Solicitor said: "This moonshine business must be broken up. Cayton's murder was caused by the moonshine business, and you must put a stop to it." Upon objection to these remarks, he continued: "I do not charge Tuten with the murder of Cayton, or that he had any connection with it. I take it all back. But I do say that his murder was caused by this moonshine business, and it must be broken up." The court did not interpose or make any comment or caution the jury. Held, prejudicial error.
2. The jurors may have been too intelligent to have been affected by these remarks of the Solicitor; yet this "does not affect the spirit of the law, which seeks by well established rules to prevent the possibility of prejudice. An opposite course would do away with the entire law of evidence, and permit the introduction of all testimony of every kind and description, competent or incompetent, relevant or irrelevant, that either side may see fit to offer. In all such cases the intelligence of the jury must be guided by the wisdom and experience of the law." (Quotation from the opinion.)
3. "The motive of the Solicitor in making the statement is not as important as its probable effect upon the jury. The best of motives sometimes lead to the most dangerous results; and if in the calmer deliberation of an appellate tribunal we see that the defendant may have been prejudiced by the inadvertent act of court or counsel, and thus deprived of that impartial trial that is guaranteed to him by the law of the

land, it is our duty to grant him a new trial." (Quotation from the opinion.)

Appeal from Superior Court, Beaufort County; Hon. George A. Jones, Judge.

Stephen Tuten, convicted of illegal selling of intoxicating liquors, appeals. Reversed.

This is a criminal action wherein the defendant has been convicted of selling spirituous liquors by the small measure without license. Upon the trial the defendant testified as a witness in his own behalf. The State offered one John W. Warren to prove the sale. This was the only evidence offered by the State. Upon cross-examination of the defendant, the solicitor asked him whether he had not been charged with the murder of John Cayton. The defendant replied that he had been charged with the said murder, and that he had been committed to jail upon the finding of the coroner's jury; that he had had no opportunity to appear before the inquest, and was not present when it was held; that the grand jury of the county had investigated the charge of murder, and had ignored the bill against him. The said Cayton had been murdered in the County of Beaufort, being shot in his house at night, about the 1st of February, 1902.

When the Solicitor addressed the jury, among other things he said: "This moonshine business must be broken up; Cayton's murder was caused by the moonshine business, and you should put a stop to it." There was no evidence offered as to the murder of Cayton, except the testimony upon the cross-examination of defendant, above stated, and there was no evidence offered to show by whom Cayton was murdered, or for what cause he was murdered. When the Solicitor made to the jury the remarks above quoted, the counsel for the defendant arose and asked the court to stop the Solicitor from commenting upon the murder of Cayton and the cause for it; that the remarks were improper, and tended to prejudice a fair trial of the defendant. As soon as this objection was made by counsel for defendant, the Solicitor partially turned from the jury and said: "I do not charge Tuten with the murder of Cayton, or say that he was connected with it. I take it all back; but I do say that his murder was caused by this moonshine business, and it should be broken up." Defendant excepted. When the Solicitor made this

statement the court did not interpose or make any correction or comment or caution the jury.

The defendant was convicted.

From a verdict of guilty and judgment thereon, the defendant appealed.

Chas. F. Warren, for appellant.

Robert D. Gilmer, the Attorney General, for the State.

DOUGLAS, J. (after stating the facts). The above is the only exception appearing in the record. In our view of the law, it must be sustained upon the principle laid down by this court in *Perry v. Railroad Co.*, 128 N. C. 471, 39 S. E. 27. In this case, as in that, the Solicitor stated a fact which there was no evidence tending to prove, and which in its very nature would tend to prejudice the defendant. It is true the Solicitor disclaimed any intention of charging the defendant with the murder of Cayton, but he immediately repeated the injurious assertion that "Cayton's murder was caused by this moonshine business, and it should be broken up." It is well known that the term "moonshine business" refers to the unlawful manufacture or sale of spirituous liquors. Like the common-law offense of "owling," applied to the unlawful exportation of wool, it derives its name from the fact that it is carried on principally at night, or at least in secret.

This was the offense for which the defendant was being tried, and the jury might have believed that the appeal to them by the Solicitor to break up the business was a plea for the conviction of the defendant, who stood charged with a crime that had led to one murder and might lead to others.

The motive of the Solicitor in making the statement is not as important as its probable effect upon the jury. The best of motives sometimes lead to the most dangerous results; and if in the calmer deliberation of an appellate tribunal we see that the defendant may have been prejudiced by the inadvertent act of court or counsel, and thus deprived of that impartial trial that is guaranteed to him by the law of the land, it is our duty to grant him a new trial.

The State lays great stress upon those cases which say that much must be left to the discretion of the Judge below as to when and how he will correct the error, either by stopping the

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counsel or cautioning the jury; but in the case at bar, the court did neither.

It is urged that the jury were too intelligent to be prejudiced by any such remark. This may be true, and yet it does not affect the spirit of the law, which seeks by well-established rules to prevent the possibility of prejudice. An opposite course would do away with the entire law of evidence, and permit the introduction of all testimony of every kind and description, competent or incompetent, relevant or irrelevant, that either side may see fit to offer. In all such cases the intelligence of the jury must be guided by the wisdom and experience of the law.

In conclusion, we may repeat what was said in *Perry v. Railroad Co.*, *supra*: "If that were all, we would hesitate to interfere; but counsel went far beyond any testimony in the case, and, over the objection of the defendant, related facts within his personal knowledge not of common information, and which were not in evidence. These facts were essentially damaging in their nature, and, coming from so high a source, were capable of producing the most dangerous prejudice. That the counsel intended no impropriety, which we cheerfully admit, does not alter the case. The fact remains that such statements, coming from one of his high character and exalted position in his profession, became only the more dangerous when addressed to jurors whose confidence he justly possessed. Such statements were not in evidence, and were not properly admissible in the argument of counsel. For the failure of his Honor to interfere at the request of opposing counsel, a new trial must be ordered."

New trial.

STATE V. THOMPSON.

106 La. 362—30 So. Rep. 895.

Decided December 2, 1901.

ARGUMENT OF COUNSEL: *Improper reference to the "fatherless" children of the deceased—Duty of the court, on its own motion, to instruct the jury, to disregard improper remarks of counsel—Authorities reviewed—No disclaimer on part of the Prosecuting Attorney.*

This being an appeal from a conviction of murder and sentence of death, in which it appears that the prosecuting officer, in his closing argument, referring to the widow of the deceased, who had been

examined as a witness for the State, said, "I will say nothing to you of her six fatherless little children;" that counsel for the accused objected and excepted on the ground, sustained by the fact, that no evidence had been offered concerning such children; that the prosecuting officer, without disclaimer, proceeded with his argument upon other grounds; that no action was taken by the trial judge; and that the jury was not instructed, either at the moment, or in the charge subsequently given, to disregard the unauthorized reference complained of; and the matter being brought to the attention of this court by means of the bill of exceptions taken to the statement so made, and of a bill taken to the refusal of the court *a quo* to grant a new trial,—the verdict and sentence are set aside, notwithstanding that the counsel for the accused made no demand that the jury be particularly instructed in the matter.
(Syllabus by the court.)

Appealed from Criminal District Court, Parish of Orleans;
Hon. Frank D. Chretien, Judge.

George Thompson, convicted of murder, appeals. Reversed.

James T. Nix and *John D. Nix*, for the appellant.

J. Ward Gurley, District Attorney, and *S. A. Montgomery*, Assistant District Attorney, for the State.

STATEMENT.

MONROE, J. The defendant, having been convicted of murder, and sentenced to death, has appealed to this court, and relies upon the following bills of exception as affording grounds for the reversal of the verdict and judgment appealed from, to wit:

"Be it remembered that on the trial of the above-entitled numbered case Hon. S. A. Montgomery, Assistant District Attorney, in his closing argument, referred to six fatherless children in his appeal to the jury, when there was no evidence in the case about any children of any kind, as is shown by the testimony of Mr. S. A. Montgomery himself, hereto annexed" (whereupon counsel for the accused objected and excepted).

To this statement the Judge *a quo* adds: "The testimony of the District Attorney, made part of this bill, shows exactly what did take place during the argument of the case. When the protest was made, the District Attorney stopped all reference to the subject-matter, and the argument continued upon other grounds. There was nothing for the court to pass upon, as the protest was heeded. I do not believe that any injury was done to the accused in this case."

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The testimony, made part of the bill, is as follows: "Q. Mr. Montgomery, will you please state what you said in your argument, in reference to the six children of the deceased, before the jury in this case? A. I remember it, I believe. The widow had been introduced by the State,—I believe I said in the argument, by the State,—to identify the body that died at the hospital,—Mr. Nix, in his argument, referred to her having been brought in in her widow's weeds. I think I said this, 'I will say nothing to you of the six fatherless little children,' or that expression. Q. Referring, of course, Mr. Montgomery, to their being made fatherless by the defendant having murdered their father? A. Referring to your reference to the widow's weeds, as the widow in question was the wife of the man Thompson was accused of killing, and she was not on the stand. Q. There had been no evidence introduced in reference to any of those children? A. None whatsoever. Q. There was no other witness that testified anything about those children? A. As I remember it, the State introduced nothing about those children. Q. And to which you made reference? A. Yes, sir. Q. Counsel for defendant objected to this line of argument? A. Well, as I remember it, at the point where I said, 'in discussing those six fatherless children,' I believe the counsel for the defense objected, calling the Judge's attention to it, and asked for the stenographer. I know, however, that there was no stenographer present, and no stenographer was produced. I have no recollection as to whether the Judge stopped me or not. My impression is, however, that he did. If he did, I don't know what he said. I know you took exception to what I was saying. Q. Didn't I take a bill of exceptions to what you were saying? A. Yes, I believe you did; and asked to have the note of exceptions recorded in lieu of a bill."

A motion for new trial was made upon the grounds which are here urged, and a bill of exceptions was taken to the refusal of the court to grant the same.

OPINION.

There can be no question of the impropriety of the Assistant District Attorney's reference to the six fatherless children of the dead man, for the alleged murder of whom the defendant was on trial for his life; and the fact that their mother, the widow of

the deceased, in her habiliments of woe, had previously been introduced as a witness on behalf of the State, was a circumstance which, so far from weakening the effect of the reference, was well calculated to prepare the jury for a deeper impression than might otherwise have been made by the pathetic mental picture thus presented to them, from beyond the record, in the closing argument for the prosecution. The counsel for the defendant objected and excepted, and the Assistant District Attorney, as the trial judge informs us, "stopped all reference to the subject-matter, and the argument continued upon other grounds." But why should he have gone further, even had no objection been made? He had informed the jury, not lawfully, but in plain violation of an elementary and universally recognized rule of law, that by the death of the man, whom the defendant in the case before them was charged with having murdered, not only had the grief-stricken woman, whom they had seen, been deprived of her husband, but six little children, whom they had not seen, and who were thus brought to their knowledge, at the close of the case, had been left fatherless. Conceding that six children had been left fatherless, and that they were little children, whose facts had not been established, and could not have been established by sworn evidence, because such evidence would have been excluded; and yet they went to the jury in the unsworn statement of the prosecuting officer, whom the counsel for the defendant could neither cross-examine nor answer in argument. The judge *a quo* states that, the protest of the defendant's counsel having been heeded, there was nothing for the court to pass on. The protest, it appears, was heeded to the extent that the prosecuting officer made no further reference to the subject which had provoked it, but "the argument continued on other grounds," with no disclaimer as to the truth of the statement which had been made, or as to the right of the speaker to make it; and it is not claimed that the judge, either at the moment, or in the charge subsequently given, instructed the jury that the statement, as made, met with his disapproval, and was unauthorized, or should be disregarded by them in considering their verdict. It is true that the counsel for the accused made no demand for such instructions, and it is also true that there is a weight of authority in support of the proposition that, even though unauthorized statements be made in argument, the

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verdict of a jury will not be reversed, unless it appears that, in addition to objecting thereto, the party complaining has requested that the jury be instructed to disregard them, and has excepted to the refusal of the court to comply with his request. This jurisprudence is, however, predicated upon the theory that the failure of the complainant to exhaust the resources at his command in order to have the error of which he complains corrected, coupled with the nonaction of the trial judge, is sufficient to justify the conclusion that no real injury has been sustained.

The general proposition is thus stated in a standard work: "It is a well established rule that it is error, sufficient to reverse a judgment, for the court to suffer counsel, against objection * * * to comment on facts, calculated to prejudice, which have no bearing whatever upon the issues, and evidence of which would have been ruled out, or to assume, *arguendo*, such facts to be in the case, when they are not. * * * Such irregularities always justify the interference of the presiding judge, for the purpose of restraint, but are not ground for the granting of a new trial by an appellate court *where it appears that the party seeking it was not, under all the circumstances, materially prejudiced.*" (Italics by the present writer).

2 Enc. Pl. & Prac. p. 727 *et seq.*

Upon the other hand, there is ample authority in support of the doctrine that it is reversible error for the trial judge to fail, of his own motion, to give such instructions as will efface from the minds of the jurors the impression made by statements of counsel which are unauthorized and prejudicial, and there are many cases in which it has been held that the wrong done is not remedied even by such instructions. Thus in *Nelson v. Welch*, 115 Ind. 270, 16 N. E. 634, 17 N. E. 569, it was said that such statements—i.e. statements predicated upon matters *dehors* the record—"are, presumably, injurious, and prejudicial to the adverse party, and the burden is upon the party offending to show that no injury resulted, or that all such steps were taken to prevent injury as were proper under the circumstances;" and that, "where the party who is injured by the wrong calls for the intervention of the court upon objections, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury. The court is bound

to interfere when so called upon, and, if an improper and injurious statement has been made, without excuse, the effect of it should be erased from the minds of the jury then and there, by an emphatic admonition from the court. The jury should be made to understand that in making the statement counsel violated the propriety of his position, and that, if they did not wholly disregard it, they would violate their duty as jurors."

In *Sasse v. State*, 68 Wis. 530, 32 N. W. 849, where the prosecuting attorney stated that the defendant had committed other crimes in foreign countries, a new trial was granted, although the court subsequently instructed the jury not to regard the statement. See, also *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575; *People v. Ah Len*, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103.

And so, in construing Act No. 29 of 1896, which, while granting a party accused the privilege of testifying in his own behalf, provides that his failure to testify shall not be construed against him, this court has held that it is reversible error for the District Attorney to call attention to the fact that the accused has not testified in his own behalf, which is not cured by the trial judge's telling the jury "that the right of an accused to testify was a privilege accorded to him, which he had a right to exercise or not, as he saw fit, and that, if he testified, he subjected himself to all the rules which applied to other witnesses, and that his failure to testify, if he chose not to do so, was not to be construed for or against him," and by the District Attorney's stating to the jury that the instructions given them by the court were the law. *State v. Marceaux et als.*, 50 La. Ann. 1137, 24 So. 611.

In the case thus referred to the similar case of *Yarbrough v. State*, 70 Miss. 593, 12 So. 551, was cited with approval. In that case it appeared that, "immediately on the prisoner's counsel excepting to the language of the counsel for the State, the court instructed the jury that the District Attorney was prohibited by law from commenting on the failure of the defendant to take the stand on his own behalf, and that the jury must not consider any such comment." The Supreme Court of Mississippi, however, upon the trial of the appeal, said: "But this action could not and did not undo the wrong already done. The statute absolutely forbids any comment on the failure of the accused to

testify, and insist that a hostile combination of Louisiana inferential prohibition of this State the inject and which that way

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testify, and it is the right of every person charged with crime to insist that he enjoy this statutory immunity from criticism by hostile counsel." And the conviction was set aside. The prohibition of the Mississippi law was plain and positive; that of the Louisiana law, as was said by this court in the case cited, "is inferential and consequential, but strong and clear." The prohibition of the common law, by which criminal prosecutions in this State are regulated, is, however, also strong and clear against the injection into a case of facts not established by the evidence, and which would be inadmissible if sought to be introduced in that way.

The character of the able and conscientious officers by whom the defendant was prosecuted and before whom he was tried puts the question of intentional injury to him entirely out of consideration. The statement complained of no doubt escaped the prosecuting officer without premeditation, and we note the expression by the trial judge of his opinion that the accused sustained no injury. But, whilst, we think that opinion entitled to great weight, we find ourselves unable to yield to it in this case, or to disabuse our minds of the conviction that, all the circumstances being considered, the defendant may have been seriously prejudiced.

It is, therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be set aside and annulled, and that this case be remanded to be proceeded with according to law.

BREAUX, J. (dissenting). I do not think that the hearsay statement of the District Attorney was such as to influence the jury. I dissented in *State v. Marceaux*, 50 La. Ann. 1138, 24 So. 611, and dissent in this case; the issues being similar.

Mr. Justice Provost takes no part, he not having been a member of the court when the case was submitted.

STATE V. BLACKMAN.

108 La. 121—32 So. Rep. 334.

Decided June 16, 1902.

ARGUMENT OF COUNSEL: *Arrogant and prejudicial demand for the death penalty—Duty of the trial judge to restrain prosecuting attorneys from improper and prejudicial remarks to juries.*

1. The District Attorney in his closing argument used this language:—"If there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on that jury." Counsel for the prisoner at the bar immediately objected to this statement as improper and prejudicial to the accused and reserved a bill. The trial judge did not interfere at the time, nor did he subsequently refer to the matter in his charge. *Held*,—sufficient cause for reversal of verdict.
(Syllabus by the Court.)

Appeal from Tenth Judicial District, Parish of Concordia;
Hon. J. L. Dagg, Judge.

Jake Blackman, convicted of murder, appeals. Reversed.

John Dale, for the appellant.

Walter Guion, Attorney General, and *Hugh Tullis*, District Attorney, (*Lewis Guion*, of counsel), for the State.

BLANCHARD, J. Defendant was indicted for murder, tried by jury, found guilty and sentenced to death.

He appeals.

In the course of his closing argument for the State, the District Attorney said, in substance, that "if there is a man on that jury who does not believe this man ought to be hung, then I say he is a weakling, not possessed of the proper manhood, and is unfit to sit on that jury."

Counsel for the accused immediately objected to this language as improper and prejudicial to his client, and reserved a bill of exceptions against the same.

Subsequently, he applied for a new trial on the ground that the language excepted to was not such as the District Attorney could legally use, and that it was calculated to prejudice and did prejudice the jury against the accused.

On the trial of this motion the District Attorney called as a witness, admitted he had used, substantially, the language quoted, but that it was said in connection with an admonition to the jury that each of them had sworn he was not opposed to capital punishment.

The motion being overruled, the bill of exceptions referred to was presented and signed. It is considered a bill taken to the language objected to, and to the court's refusal to grant the new trial applied for on that ground.

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tion to it, the bill recites that the District Attorney did not retract what he had said, nor tell the jury not to regard the same. Neither was the trial judge asked to instruct the jury not to regard the same, and he did not give such instruction.

It is also stated that the remark of the District Attorney was not provoked by anything said in argument by counsel for the accused. The bill contains nothing in the way of a statement by the judge himself.

Ruling—In prosecutions for capital crimes, juries in this State are given by the law discretion as to the punishment to be inflicted on the accused found guilty. Thus, a verdict "guilty as charged" would mean the infliction of the death penalty; while a verdict "guilty without capital punishment" would mean life imprisonment at hard labor.

It is the only case—prosecutions for capital offenses—where juries are permitted to have anything to do or say with regard to the sentence to be pronounced upon persons convicted of crime.

In a murder trial the jury may be convinced of the guilt of the accused, and yet there may be some mitigating circumstance, or other consideration, superinducing to the infliction of a penalty less than death. The law vests this power of mitigation in the jury and not the judge.

They must be left free to its full and untrammelled exercise, under proper instructions by the court.

It is not for the District Attorney, prosecuting on behalf of the State, to harangue the jury as to the punishment that should be meted out to the guilty culprit, and tell them, in substance, that if they do not bring in a verdict that will hang the man, instead of sending him to the penitentiary, they are weaklings, devoid of manhood and lacking in the qualities necessary to fit them for the proper discharge of those duties of citizenship relating to jury service.

The District Attorney, in this case, did not content himself with demanding of the jury that they find the accused guilty; he did not confine himself to expressing his opinion, based on the proof administered, of his guilt. He went further. He demanded, under penalty of his scorn and contempt if they did otherwise, that a verdict be brought in that would hang the man.

It was a trenching on the province of the jury not permissible.

The language used was intemperate and improper. It was calculated to unduly influence the jury in deciding on the punishment to be inflicted on the guilty man—something with which the prosecuting officer has nothing to do.

If they do not believe he should hang, the District Attorney expresses his opinion of them in advance that they are weaklings.

If they should reach, in their consultations in the jury room, the conclusion he should not be consigned to the gallows, they are, in anticipation, denounced by him who represents the State as without courage or manhood and unfit to discharge one of the most ordinary of the duties of citizenship.

It was an appeal to the jury not merely to reach the conclusion of guilt which was proper, but an admonition to them that they would be recreant in their duty if they returned a qualified verdict, which under the law they had the right to do, and as to which they should have been left the sole judges, unbiased by the forcible assertion of the prosecutor's opinion.

A District Attorney should not throw the weight of his personal influence into a case which he is conducting as a public officer by announcing his individual opinion that the accused deserved hanging. *State v. Mack*, 45 La. Ann. 1157, 14 So. 141. In *State v. Jones*, 51 La. Ann. 103, 24 So. 594, it was stated that where a prosecuting officer abuses the privilege of argument to the manifest prejudice of the accused, it is the duty of the trial judge to interfere, and if he fail to do so, and the impropriety is gross, it is good ground for reversal.

We must hold the instant case comes within the rule thus announced.

Though the District Attorney's statement was objected to by counsel for the accused, it does not appear that the trial judge interfered, and though the matter was by the exception reserved called specially to his attention, he did not in his charge to the jury refer to it in any way.

In *State v. Thompson*, 106 La. 366, 30 So. 897, this court said:

"There is ample authority in support of the doctrine that it is reversible error for the trial judge to fail, of his own motion, to give such instructions as will efface from the minds of the jurors the impression made by statements of counsel which are unauthorized and prejudicial, and there are many cases in which

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And the court, in that case, quoted as follows from *Nelson v. Welch*, 115 Ind. 270, 16 N. E. 634, 17 N. E. 569:

"Where the party who is injured by the wrong calls for the intervention of the court, upon objections, it will not do for the court to remain silent, leaving the matter of misconduct with the offending party and the jury."

The *Thompson Case*, which was a trial for murder, is the latest expression of this court on the question we are dealing with. There the prosecuting officer, in his closing argument, referring to the widow of the deceased who had been examined as a witness for the State, said:

"I will say nothing to you of her six fatherless little children."

Counsel for the accused objected and excepted on the ground that no evidence had been offered relative to such children. No action was taken by the trial judge, and he did not, either at the moment or subsequently in his charge, instruct the jury to disregard the unauthorized reference complained of. The verdict and sentence were set aside, notwithstanding no demand was made on the judge by counsel for the accused for instructions to the jury in the matter.

Had the judge, in the case at bar, on objection made, interfered, and either then, or later in his charge, instructed the jury that the District Attorney had no right to use the language complained of, and for them to give no heed to it, and otherwise instructed them as to their rights and duties with regard to the character of verdict the law authorized them to return, we would hold that this saved the error of the prosecuting officer from vitiating the verdict.

But in the absence of such action by the judge we are constrained to remand the case.

It is, therefore, ordered, adjudged and decreed that the verdict and sentence appealed from be set aside and that the case be remanded for further proceedings according to law.

NOTE (by J. F. G.).—The opinion is right. When the law grants to the jury the right to fix the penalty, it expresses full confidence in the ability of the jury to fix the penalty, without orders from the public prosecutors. The practice of public prosecutors of *demanding the death penalty*, is too prevalent and it is to be hoped that other courts will

join with the Supreme Court of Louisiana in discouraging it. Jurors are generally disposed to deal with matters honestly, and as they are drawn from the community at large representing various phases of society, as well as being engaged in various avocations, with varied experiences, they are better able to pass on the matter than the ordinary public prosecutor, who generally holds his office through political favor, and, may be goaded to extremes by various influences, among which, may be sensational sentiment, founded on rumor instead of facts. If twelve honest jurors, after weighing the evidence resolve to find the accused guilty of murder, hesitate to fix the penalty at death, the fair presumption is that such penalty should not be imposed; and in such, *it is an attack upon the law itself*, to attempt to coerce those jurors to surrender the discretion vested in them by the law.

GROVES V. STATE.

116 Ga. 516-42 S. E. Rep. 755.

Decided November 12, 1902.

ATTEMPT: *Mere preparation does not amount to an attempt—Authorities reviewed.*

1. Mere preparatory acts for the commission of a crime, and not proximately leading to its consummation, do not constitute an attempt to commit the crime.
(Syllabus by the Court.)

Error to Superior Court, Chatham County; Hon. Pope Barrow, Judge.

W. C. Groves was indicted for an attempt to commit robbery. A demurrer to the indictment was overruled. He brings error. Reversed.

Robt. L. Colding and John R. Cooper, for the plaintiff in error.
W. W. Osborne, Solicitor General, for the State.

FISH, J. W. C. Groves, E. H. Mahlay, and Joe Waters were indicted for an attempt to commit robbery by force upon the person of Frank Deiter. The indictment alleged that the accused "in such attempt did do an act towards the commission of said crime, to wit, by hiring a hack for the purpose of assisting them in the commission of said crime, to wit, by ascertaining that said Frank Deiter had no weapon of offense, to wit, by procuring false faces for the purposes of a disguise, but were intercepted and prevented from executing said crime." Upon the trial of

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Groves, he demurred to the indictment, one of the grounds of demurrer being that the acts alleged did not make out the offense charged. The demurrer was overruled, and the accused excepted.

We think the demurrer should have been sustained. The indictment was based upon section 1040 of the Penal Code, which declares that "if any person shall attempt to commit a crime, and in such attempt shall do any act towards the commission of such crime, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, he shall, in cases where no provision is otherwise made in this Code, or by law, for the punishment of such attempt, be punished as follows," etc. In order to constitute the offense of attempt to commit a crime, the accused must do some act toward its commission. Commission, means the act of committing, doing, or performing the act of perpetrating. Webst. Dict. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it. In *People v. Murray*, 14 Cal. 159, it was held that declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a magistrate to solemnize the ceremony, were mere acts of preparation, and did not constitute an attempt to commit the crime. Chief Justice Field, who delivered the opinion in that case, said: "Between the preparation for the attempt, and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made." In *U. S. v. Stephens*, (C. C.) 12 Fed. 52, 8 Sawy. 116, the accused was charged with an attempt to introduce spirituous liquors into Alaska in violation of an act of Congress. The evidence showed that he sent from Alaska, where he resided, to a wholesale dealer in San Francisco, an order for 100 gallons of whisky, to be shipped to him in Alaska. It was held that he was not guilty of an attempt to introduce the whisky into Alaska, as he had done no act to carry out his illegal intent of which the law could take cognizance; the offer to purchase the whisky being an act preparatory and indifferent in its character. "Procuring or loading a gun, or buying poison, or walking to a particular place, with intent to kill another, is not enough to make one guilty of an

attempt to commit murder. The same is true of a purchase of coal oil and matches with intent to commit arson, or the procuring of metal and dies with intent to commit the offense of counterfeiting money. * * * These acts are mere preparations, indifferent in their character, and do not advance the conduct of the party far enough to constitute an attempt." Clark & Marshall Law of Crimes, § 123, and cases cited.

Mr. Clark, in his work on Criminal Law (2d Ed., p. 126), says: "An attempt to commit a crime is an act done with intent to commit that crime, and tending to, but falling short of, its commission," and that two of the essential elements of the offense are: "(1) The act must be such as would be proximately connected with the completed crime. (2) There must be an apparent possibility to commit the crime in the manner proposed." Again, on page 127, the author says: "To constitute an attempt, there must be an act done in pursuance of the intent, and more or less directly tending to the commission of the crime. In general, the act must be inexplicable as a lawful act, and must be more than mere preparation. Yet it cannot accurately be said that no preparations can amount to an attempt. It is a question of degree, and depends upon the circumstances of each case." Citing *Com. v. Peaslee*, 177 Mass. 267, 59 N. E. 55, and *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770. Mr. Bishop defines an attempt to be "an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient both in magnitude and in proximity to the fact intended to be taken cognizance of by the law, that does not concern itself with things trivial and small. Or more briefly, an attempt is an intent to do a particular criminal thing, with an act towards it falling short of the thing intended." 1 Bish. New Cr. Law, § 728. "Mere preparation, when made at a distance from the place where the substantial offense is to be committed, is ordinarily too remote an act to satisfy the law of indictable attempt." *Id.* § 763. As defined by Bouvier, an attempt to commit a crime is, "an endeavor to accomplish it, carried beyond mere preparation, but falling short of the ultimate design." Burrill gives substantially the same definition. We think it manifest that the hiring of the hack, the ascertaining of the fact that the intended victim had no weapons, and the procuring of the false faces for dis-

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guise, were merely preparatory acts, and not proximately leading to the consummation of the crime of robbery, and that therefore no attempt to commit that offense was sufficiently charged in the indictment.

The Solicitor General, to sustain the indictment in the present case, relied on the case of *Griffin v. State*, 26 Ga. 493. The indictment in that case charged Griffin with an attempt to burglarize a certain storehouse by unlawfully taking the impression of a key which unlocked a door to the same, and from that impression preparing a false key to fit such lock, for the purpose of unlawfully, feloniously, and fraudulently entering, and, through the agency of one Jones, to break and enter the storehouse with intent to steal. The accused demurred to the indictment upon the ground that it did not charge any offense against him which was punishable by law, and that the facts charged against him did not constitute the offense of attempt to commit larceny from the house. The demurrer was overruled, and upon the trial the accused was convicted. He excepted to the overruling of the demurrer, and to various rulings made by the court during the trial. McDonald, J., delivered the opinion; Lumpkin, J., concurred; and Benning, J., dissented. Judge McDonald, in his opinion, said: "The object of the act [now section 1040 of the Penal Code] under which the plaintiff in error is indicted is to punish intents to commit crime, if they are demonstrated by an act. The word 'attempt' ordinarily implies an act, an effort; but the General Assembly, in this statute, uses it as synonymous with 'intend,' for it declares that if a person shall attempt to commit a crime, and in such attempt shall do any act towards the commission of such offense, etc. The accused, according to the bill of indictment, conceived the purpose of perpetrating the offense, and he did an act towards the commission of it, for it was an act to take the impression of the key, and that alone is sufficient to subject him to the law; but he prepared the key, and for the object, and so the indictment alleges." The learned judge therefore held that the demurrer was properly overruled. While Judge Lumpkin concurred in the affirmance of the judgment of the trial court, he does not, in his concurring opinion, refer to the question made by the demurrer, as to whether the acts charged in the indictment constituted the offense of an attempt to commit

larceny from the house. He sets forth the evidence submitted upon the trial, which went far beyond the allegations in the indictment, and says: "The proof being full and complete as to the foregoing facts, was the conviction of Griffin for an attempt to commit larceny from the house legal?" He continues: "What is an attempt to commit a crime? It is an endeavor to accomplish it, but falling short of execution of the ultimate design. [Substantially the same definition given by Bouvier and Burrill.] In many cases it is difficult to determine the difference between preparations and attempts to commit crime. One may intend to commit a crime, and do many things towards its commission, and yet repent of his purpose. The law gives to such an one a *locus penitentiae*. One of the illustrations given in the books is, where a man buys poison and mixes it in the food designed for his victim, and places it on the table that he may eat. If he take back the poisoned food before it is tasted or an opportunity is given of swallowing it, awakened by a just consideration of the enormity of the crime, he will not be guilty of an attempt to poison. All that was done would amount only to preparation. Is this Mr. Griffin's case? Did he countermand his repeated instigations to his supposed confederate, urging him to the speedy execution of his diabolical scheme? Did he recall the key? On the contrary, had he not consummated his part of the preparations,—all he had to do except to share the spoils? And was he not waiting in hopeful anxiety to learn the result?" Judge Lumpkin's concurrence was based upon the theory that the evidence made out a case of attempt to commit larceny from the house. The language quoted certainly does not indicate that he subscribed to the construction placed by Judge McDonald upon the statute defining an attempt to commit a crime. Judge Benning did not concur in the affirmance of the judgment of the court below. In his opinion, the trial judge erred in overruling the motion for a continuance, and in refusing to give a charge requested by counsel for the accused. At most, therefore, the judgment of this court in Griffin's case was concurred in by only two judges, and consequently is not binding authority. Nor has that case been followed by subsequent adjudications of this court holding that certain specified acts do not constitute an assault. As an assault is an attempt to commit a crime,—that is, a violent injury upon the person of another,—such later adjudications a

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cations are directly in point in determining the question under consideration.

In *Brown v. State*, 95 Ga. 481, 20 S. E. 405, it was held: "Mere preparation to commit a violent injury upon the person of another, unaccompanied by a physical effort to do so, will not justify a conviction for an assault; and therefore where the evidence showed that, during an altercation between the person alleged to have been assaulted and two other persons acting in concert, one of the latter picked up a stone, but made no attempt to cast it at the former, who was about twenty steps distant, neither of the two persons so acting in concert could be lawfully convicted of an assault."

In *Peebles v. State*, 101 Ga. 585, 28 S. E. 920, it was held: "The act of maliciously putting poison into a well with the intent that the water thereof shall be drunk by another, and that he shall in this manner be killed, does not, without more, constitute the offense of an assault with intent to murder, when the person whose death was intended never in fact drank of the water after the poison had been introduced into the same."

In *Jackson v. State*, 103 Ga. 417, 30 S. E. 251, where the accused was charged with assault with intent to murder, it was held to be erroneous for the trial judge to refuse to give in charge a written request that "mere preparation to commit a crime upon the happening of an event which may or may not occur, and which depends upon an act to be done or not done by the person acted upon, is not an attempt to commit the offense of assault with intent to murder."

In *Gaskin v. State*, 105 Ga. 631, 31 S. E. 740, it was held: "Before there can be a conviction for the offense of assault with intent to commit a rape, it must appear that the accused, with the intention of having carnal knowledge of the female forcibly and against her will, did some overt act amounting to an assault upon her. It was therefore error to charge the jury that, 'If you find that this defendant formed the intent and design in his heart to have carnal knowledge of [the female alleged to have been assaulted] forcibly and against her will, and, in the accomplishment of that evil design and intent, slipped into her room, and secreted himself there, awaiting an opportune moment to carry his evil design into execution, and, being detected, fled and made his escape, the court charges you that that would make

such a case as that the necessary element of assault would be in it, and you would be authorized to find this defendant guilty of the offense as charged in the indictment,—that of an assault with intent to rape."

Again, in *Burton v. State*, 109 Ga. 134, 34 S. E. 286, it was held: "One cannot legally be convicted of the offense of assault with intent to murder, alleged to have been committed with a pistol, upon proof which merely shows that he drew the weapon from his hip pocket, and, in consequence of its being caught in the lining of his coat, did not make any actual attempt to inflict with the pistol an injury upon the person alleged to have been assaulted."

On the same line, in the late case of *Penny v State*, 114 Ga. 77, 39 S. E. 871, (13 Amer. Crim. Rep. 77) it was held that the court erred in refusing to charge, as requested in writing, that: "A mere preparation to commit a violent injury upon the person of another, or a mere threat to do so, unaccompanied by physical effort to do, will not justify a conviction for an assault. Mere words or threats, unaccompanied by some physical effort to commit a violent injury upon the person of another, will not justify a conviction for an assault."

In view of what we have said, the judgment overruling the demurrer to the indictment must be reversed.

All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

IN RE WATTS AND SACHS.

190 U. S. 1.—47 Law Ed. 933—23 Sup. Ct. Rep. 718.

Argued April 20, 1903—Decided May 18, 1903.

ATTORNEYS, NOT IN CONTEMPT OF COURT FOR ADVICE HONESTLY GIVEN—
BANKRUPTCY JURISDICTION—CONFLICT BETWEEN FEDERAL AND STATE
COURTS: *The independence of the bar, vital to the due administration of justice.*

1. When assumed, the jurisdiction of the Federal Courts under the bankruptcy laws is paramount, and essentially exclusive, and, can not be avoided or defeated by a pending action in a State Court to wind up the affairs of the bankrupt under the provisions of a State law; but necessarily, when the Federal Court takes jurisdiction, it becomes as a matter of comity, that care should be taken to avoid

- collision
2. "In the faith and in the judgment too vitally applicable
3. In the presence of the United States between the due indulgence of character are too
4. The petition gave advice State Court bankruptcy petitioners did not

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- collision in respect to property in the possession of the State Court.
2. "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he can not be held liable for error in judgment. The preservation of the independence of the law is too vital to the due administration of justice to allow of the application of any other general rule."
 3. In the present instance, a contempt proceeding in a District Court of the United States was based on the theory that a conspiracy existed between certain attorneys and a judge of a State Court to obstruct the due administration of justice. Such charges ought not to be indulged in; for, "the ultimate consequences of attacks of such a character by the courts of one Government on the courts of another are too serious to allow them to be made."
 4. The petitioners were sentenced for contempt of court, for that, they gave advice, as attorneys, upon which, it is claimed, a judge of a State Court interfered with the administration of justice in a bankruptcy proceeding, in a Federal Court. Held, that as the petitioners acted in good faith, as attorneys, their advice, so given, did not amount to contempt of court.

Supreme Court of the United States.

Original Proceeding. *Habeas Corpus* and *Certiorari*. Petitioners discharged.

Statement by Mr. Chief Justice Fuller.

M. Zier & Company, a corporation located at New Albany, Indiana, engaged in the boiler manufacturing business, was hopelessly insolvent on and prior to December 30, 1902, and some thousands of dollars had been drawn from its treasury by the manager of its affairs for the purpose of making certain payments, of which \$3100 had been paid to Ryerson & Son, a corporation of Chicago, Illinois, and a large creditor of the Zier Company, previously to December 30, and \$9600 was on that day placed by M. Zier, the manager of the company, in the hands of his attorneys to be paid over to Zier's sister-in-law, who was a stockholder and creditor in the Zier corporation. It was arranged by Zier's attorney with the Chicago corporation on December 29 that the latter should apply for the appointment of a receiver of the Zier corporation, and that the New Albany Trust Company should be appointed receiver, and this resulted in a complaint filed by the Ryerson corporation, represented by W. W. Watts, a member of the bar of Kentucky, in the Circuit

Court of Floyd County, Indiana, charging that the Zier Company was insolvent and was dissipating its property and assets, and praying for the appointment of a receiver, "and that the court shall make such orders as shall be necessary and proper for the preservation of said property, for the continuance of said business, for the purpose of completing unfinished contracts," etc., to which defendant voluntarily appeared and consented to the appointment of the New Albany Trust Company as receiver. The appointment was accordingly made, and the Trust Company immediately qualified and proceeded to administer the estate and wind up its affairs.

On January 16, the Trust Company, as receiver, filed its report and petition, giving an inventory and appraisal of the assets of Zier & Co., the receipts and expenditures of the receiver to that date, the particulars in respect of outstanding contracts; raising the question as to the further operation of the plant, and advising an order for a meeting of the creditors to consider that subject; requiring creditors to prove their claims, and enjoining them from the prosecution of suits except by intervention. A list of the creditors was attached, which included the Inland Steel Company, John C. Thurston, and the Dey Time Register Company.

The court entered an order directing such meeting to be held January 24, and notice by mail to be given, which was done, and the meeting was held on that day, a large number of creditors being represented, including the Inland Steel Company. An order was thereupon entered for payment of rent, the completion of unfinished contracts, for the continuance of the operation of the plant to a specified extent, for the issue of certificates of indebtedness to a small amount, but that no new contracts should be made. It was further ordered that creditors be notified by mail and by publication to file their claims on or before May 11, and "that all creditors and other persons be and they are hereby enjoined and restrained from prosecuting any claim or suit against this estate except by intervention in this cause or by first obtaining leave of this court."

February 6, 1903, the Inland Steel Company, John C. Thurston, and John Dey, doing business as Dey Time Register Company, creditors of the Zier corporation to the amounts of \$935, \$15, and \$100, respectively, filed their petition in bankruptcy in

the United States District Court for the District of Indiana against that corporation to have it declared a bankrupt. The petition alleged that the company was hopelessly insolvent and had committed, within four months next preceding the filing of the petition, acts of bankruptcy, which were specified. It was further alleged that it was necessary, for the preservation of the estate of Zier & Company and for the benefit of its creditors alike, that a receiver in bankruptcy be appointed at once to take charge of the affairs of said company. On February 11 a further petition was filed by the Inland Steel Company, and, on the same day, a supplemental petition, in which the appointment by the Circuit Court of Floyd County of a receiver and his being put in charge of the insolvent's property, were set up as additional acts of bankruptcy.

The District Court thereupon appointed Frederick D. Connor as receiver, and directed that he should take into his possession the plant of Zier & Company and all its other property, and further ordered that the New Albany Trust Company should deliver up to the receiver all the property of Zier & Company and refrain from in any way interfering with him. The receiver immediately qualified by giving bond as required by the court.

February 13, 1903, and before the receiver of the District Court had made demand for the property, on learning of Mr. Connor's appointment as receiver, Mr. Watts, after consulting with the local attorneys of Zier & Company, communicated with the District Judge and requested that the Federal receiver should not proceed until he, Mr. Watts, could procure an order from the Floyd Circuit Court permitting him to do so, and could come to Indianapolis, and present to the District Judge reasons why the receiver should not have been appointed by that court, and why his order to that effect should be vacated. The District Judge immediately caused the court's receiver and the attorneys interested in the case to be notified to take no further steps until a hearing could be had on the questions suggested by Mr. Watts, on February 16, at Indianapolis. No further action was taken by the receiver of the District Court, but he presented to the Floyd Circuit Court a petition setting forth his appointment and qualification, together with a certified copy of the order appointing him, on the morning of Saturday, February 14, and asked the delivery to him of the property and effects of

Zier & Company and the discharge of the Trust Company as receiver. The Floyd Circuit Court entered an order reciting that Connor, as receiver, came by his attorney, "and by leave and order of the court, and upon his own motion, makes himself a party to this proceeding, and thereupon by leave of the court files his verified petition showing his appointment as receiver of said M. Zier & Co. by order of the United States District Court for the District of Indiana," and praying for the surrender of the property, "and the matter of said petition is now continued until the next term of this court." Saturday, February 14, was the last day of the term, and the next term of the court commenced on the ninth day of March.

On the same day, February 14, the Trust Company by Watts, its attorney, filed its petition, framed by him, which alleged that the Trust Company was carrying out as receiver the terms of the order of January 24; that that order had been entered without objection from the Inland Steel Company, John C. Thurston or the Dey Register Company, or any creditor; that the three last-mentioned creditors had filed a petition in involuntary bankruptcy against M. Zier & Company, February 6, 1903; that supplemental petitions were filed February 11, 1903, but that the petitions, although setting up the receivership in the State Court, had not shown to the United States District Court the participation of the Inland Steel Company in the proceedings of January 24, its appearance, and the restraining order and injunction; that thereupon the order had been obtained in the bankruptcy proceedings appointing Connor receiver, and directing him to take charge of the estate of M. Zier & Company in bankruptcy, and directing the receiver of the State Court to deliver up the property. The petition further averred that the creditors whose appearance was noted in the State Court on January 24 had claims aggregating \$53,279.51; that creditors with claims aggregating \$11,622.49 had filed claims with the State Court receiver, making a total of \$64,902.00 in amount, so filed or appearing, out of a total liability of \$76,463.36; that the total number of creditors was seventy-six; that thirty-seven appeared to the action, and twenty-five, including the Dey Time Register Company, had filed their claims with the State Court receiver, making a total of sixty-two creditors who had appeared or filed their claims.

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That, with a view to the due observance of the comity existing between the State and the Federal Courts, and of avoiding a clash of jurisdiction, petitioner had communicated through its attorneys with the United States District Judge and requested the non-enforcement of his order until after the matters in question had been presented to the State Court, with the request that that court direct it and its attorneys to lay said matters before the judge of the District Court, whereupon the District Judge requested counsel to notify the attorneys of the creditors petitioning in bankruptcy that the matter would be heard on Monday, February 16, in Indianapolis, and that in the meantime the order appointing Connor was not to be enforced.

The petition further alleged that the court was about to adjourn over to the first day of its next term, March 9; that the order of January 24, directed petitioner as receiver to go on and complete various contracts; that it had entered upon the work; that the operation of the plant was for the beneficial purposes of the estate; and that the stoppage of the plant would involve loss to the creditors and many complicated questions of damage; that it would work great hardship to leave the estate with the court adjourned and without instructions as to what to do; and that the petitioner was this court's officer, and must be ordered and directed by this court only, with respect to the property in its hands.

Petitioner averred that the injunction and restraining order of the State Court had been knowingly violated by the Inland Steel Company and the Dey Time Register Company; that these two creditors and all other creditors were estopped from prosecuting the petition in bankruptcy, and from seeking to take from petitioner the assets in its hands as receiver; and that all the creditors were enjoined from prosecuting any attempt to take from the receiver any of the assets in its hands except by leave. And, further, that the record in the District Court of the United States for the District of Indiana did not disclose all the facts regarding the matters herein; that that court had no information as to the restraining orders and estoppels, by entry of appearance, participation, and otherwise. That the assets of the Zier Company were *in custodia legis*; that the parties had submitted themselves to this forum; that the court came into lawful custody of the property, and that orders and proceedings

were entered and had before the institution of the bankruptcy proceedings, and the attempt to oust this court and receiver therefrom. Petitioner, therefore, asserted its belief that the District Court, under the peculiar circumstances of the case, would coincide with the State Court, if it should deem wise to enter orders specifically restraining the Inland Steel Company, John L. Thurston and the Dey Time Register Company and their attorneys; Connor; and the United States marshal from further prosecuting any matters in relation to the estate or of taking of the assets in any manner, except by intervention in this action.

Petitioner prayed for instructions; that it should present the facts to the District Court of the United States, either by limited or general appearance in the bankruptcy proceedings, and ask such relief, if any, as this court might direct; and that an injunction be granted.

An order was then entered, prepared by Mr. Watts, embodying matters set up in the petition, granting an injunction, ordering the operation of the plant to continue, and directing the receiver, through its attorneys, to proceed to Indianapolis and there by a limited appearance to lay before the District Court the facts with regard to the matters herein, and to suggest to that court the orders of this court, and its belief that with full information of the facts the order of that court would at most have been a direction for application to be made to this court for the delivery of the assets to the receiver or trustee of the District Court. It was further ordered that the Inland Steel Company, John L. Thurston, and the Dey Time Register Company show cause why they should not be punished for contempt in disobeying the orders of this court by taking action without obtaining leave.

On Monday, February 16, Mr. Watts, with the vice president of the New Albany Trust Company, receiver, appeared in the District Court at Indianapolis, and the proceedings in the State Court, including the petition and order of February 14, were laid before that court, and hearing was had that day and on February 17. At the conclusion of the argument the District Judge announced his ruling that the court in bankruptcy had supreme and exclusive jurisdiction in the matter; and asked Mr. Watts and the representative of the Trust Company if it were not better to avoid the clash of jurisdiction by voluntarily turn-

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ing the property over to the Federal receiver, indicating at the same time that otherwise it would be his duty to exert the power of the court in vindication of its jurisdiction. Mr. Watts and his colleague thereupon announced that the property would be turned over to the Federal receiver. Mr. Watts at the same time stated to the court that he would do all in his power to see that the proceedings in the State Court of February 14 were stricken out, and that he would endeavor to have the State Court make an order directing the surrender of the property.

The District Court, on February 17, made the following order:

"This cause coming on now to be heard upon the petition of Frederick D. Connor, filed herein on the 16th day of February, A. D. 1903, for the instruction of the court concerning the property and assets of said M. Zier & Company, which are now in the possession of the New Albany Trust Company, as receiver of the Floyd Circuit Court, in a suit therein pending against said M. Zier & Company, because of their insolvency; and the petitioning creditors in this cause and said Connor, receiver as aforesaid, being now present and represented by George H. Hester and William Wilhartz, their solicitors, and said New Albany Trust Company, receiver as aforesaid, being now present and represented by Henry E. Jewett, its vice president, and by William W. Watts, its solicitor, and after argument by counsel, the said New Albany Trust Company, as receiver of the Floyd Circuit Court, by its said vice president, having voluntarily offered and agreed, by and with the consent and approval of said William W. Watts, its solicitor, in open court, to surrender full and immediate possession and control of the property and assets of said M. Zier & Company, in its possession or under its control, as receiver of the Floyd Circuit Court, to said Connor, as receiver of this court, upon the presentation by him to said New Albany Trust Company of a certified copy of the order for his appointment as such receiver heretofore made by this court. It is now hereby ordered by the court that said Connor, receiver as aforesaid, forthwith present a certified copy of the order for his appointment as such receiver to the said New Albany Trust Company, and immediately thereupon take full possession and control of the property and assets of said M. Zier & Company that are now in the possession or under the control of said New

Albany Trust Company, as receiver of the Floyd Circuit Court."

On February 19 the Trust Company by its vice-president filed a report in the Floyd Circuit Court, in which it stated that, in pursuance of the order of the court, it had appeared before the District Judge in Indianapolis on Monday, February 16, and, upon the hearing in that court, the receiver had stated that it was ready and willing to deliver to the receiver appointed by the Federal Court all the property and assets of Zier & Company in its hands; that it had not yet been able to make up its accounts as receiver, but was preparing the same to submit to the court, and was willing to turn over all the property to the Federal receiver; and prayed leave from the court to do so. The company further asked that upon the presentation and approval of its accounts as receiver, its resignation be accepted, and that it be fully and finally discharged.

On the same day Connor demanded of the Trust Company the property of Zier & Company in its possession, to which that company at once replied that it had that morning filed before the judge of the Floyd Circuit Court, in chambers, a report, a copy of which was attached; that the judge had stated orally that he wished the property held until the accounts of the Trust Company as receiver were rendered and passed on; that the company thought this might be done the next day, and desired, if Connor was willing, to defer action until then, because it would "relieve us of embarrassment in the premises. On the other hand, if you insist on immediate surrender of the property to you, we are bound to say that we believe that to carry out in good faith the understanding with the Honorable Judge of the United States Court of Indianapolis and our vice-president, H. E. Jewett, we ought to surrender the property to you at once." Connor declined to grant further time, and the Trust Company turned over to him the plant of Zier & Company, which constituted all the property of that company except certain books and cash. Connor immediately took possession of the property and put watchmen in charge to hold the same for him.

On February 20 the United States Tube Company presented to the Floyd Circuit Court, "in vacation, at chambers," a petition signed and verified by D. A. Sachs, in which it was set forth that the Trust Company, as receiver, had wrongfully turned

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over and surrendered the possession of the boiler plant of Zier & Company to Connor, the receiver in bankruptcy, and was threatening to turn over to Connor all the other assets of Zier & Company in its hands. Petitioner therefore prayed that the Trust Company be cited to appear before the court, in chambers, on the afternoon of that day, and show cause why it should not be punished for contempt, and that if the court found that the Trust Company had violated its orders as represented that it be removed from its office as such receiver and a successor be appointed; and that the Trust Company be required to account immediately and turn over to its successor the property of Zier & Company. On this petition the judge of the Floyd Circuit Court on the same day entered an order removing the Trust Company from the receivership and directing it to account for the assets of Zier & Company. The order further provided for the appointment of Charles D. Kelso as receiver and directed him, on qualification, to demand of the Trust Company and Connor the immediate possession of the property of Zier & Company which came into the hands of the Trust Company as receiver, and should Connor fail or refuse to surrender the possession of the assets, that he at once report to the judge for further instructions.

Kelso, having qualified, on the same day reported to the judge at chambers that he had demanded of the Trust Company the possession of the assets of Zier & Company, and that the Trust Company had refused to surrender the possession for the reason that it had turned over the possession of the plant to Connor, and that as to the other assets it intended to account forthwith to the judge of the Floyd Circuit Court; and that he then demanded the property of Connor, who refused to surrender the same. The State Court then entered an order that a writ be issued, directed to the sheriff of the county, requiring him immediately to seize and deliver to Kelso all the property which Connor had in his possession, and forthwith to make a return to the court.

February 21, Connor filed a petition in the District Court, in which, after setting forth the facts as to the delivery of the possession of the plant of Zier & Company to him, February 19, he stated that he retained possession of the same until February 20, when possession was demanded of him by Kelso, as

receiver appointed by the Floyd Circuit Court, which demand he refused; that he was served with a certified copy of the order of the Floyd Circuit Court, and with a writ issued by that court February 20, to the sheriff, requiring him forthwith to take possession of the plant and the assets; and that the sheriff forcibly took possession thereof, and delivered the same over to Kelso, who was then in possession.

The petition of Connor further stated:

"That this petitioner believes the above-stated proceedings were procured to be had by William W. Watts, Esq., of Louisville, Ky., who during the continuation of the New Albany Trust Company, as receiver of M. Zier & Company, represented said Trust Company as such; that said Charles D. Kelso is now represented by one D. A. Sachs, Esq., of Louisville, Ky., an attorney-at-law, and that the petitioner believes that said Sachs also assisted in procuring the orders of the said Floyd Circuit Court above set out, and the petitioner further says that he verily believes the forcible removal of said property from his possession and control as receiver appointed by this court as aforesaid, was brought about by the joint action and efforts of said Charles D. Kelso, as receiver, and Charles D. Kelso, individually, and William W. Watts, as attorney for said New Albany Trust Company, and D. A. Sachs, attorney for said Charles D. Kelso, receiver."

The petitioner further prayed that Kelso, as receiver and individually; the sheriff, the deputy sheriff, and the custodian of the plant; and William W. Watts, as attorney for the Trust Company, and D. A. Sachs, as attorney for Kelso, be required and directed to redeliver the property to petitioner, and be cited to appear and show cause why they should not be punished for contempt.

On this petition the District Court, February 21, made an order requiring the parties therein named to appear before it at Indianapolis on February 25 to show cause why they should not redeliver the property, and restraining them from in any way interfering therewith; and further ordering that the parties show cause why they should not be punished for contempt. On the same day, the United States District Attorney for the District of Indiana filed informations in the District Court against Kelso, Watts, Sachs, and others for contempt

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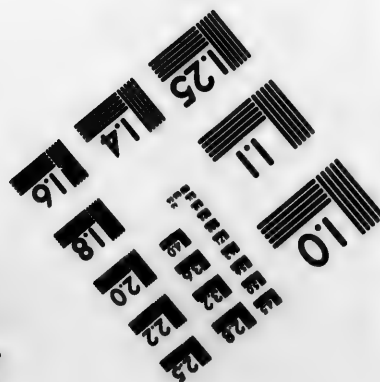
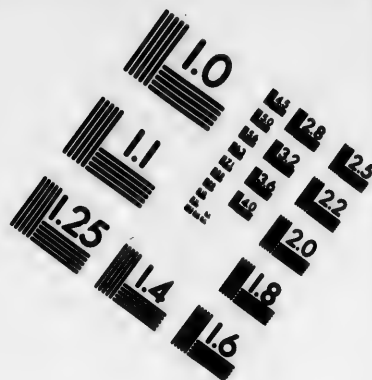
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of the District Court in disobeying and disregarding its orders. Watts and Sachs filed separate answers and pleas to the rule to show cause and to the information against them, which were traversed by the United States District Attorney.

William W. Watts, by way of response to the rule, and plea to the information, pleaded that he was not guilty of the alleged contempts stated in the rule and information or either of them. He denied that he had committed or advised any act of contempt of the orders of the District Court, or that he had in any way, directly or indirectly, or by aiding or advising, forcibly, or in any other way, taken from the receiver in the bankruptcy proceedings the property of Zier & Company, or any part of it, or in any way, by aiding, abetting or advising, had withheld the custody of said property or any part of it. But he said that the orders of the District Court directing its receiver to take the property of Zier & Company into its custody were void because of want of jurisdiction, and that the possession of the property by Connor, receiver, was wrongfully and unlawfully obtained, and the retaking under the orders and writ of the Floyd Circuit Court was a lawful and proper taking.

He then set up the various proceedings hereinbefore enumerated, and the part he took therein; adding: "All this was done solely for the purpose of preventing any possible conflict between the two jurisdictions, and it was believed by this defendant and respondent, and by the said New Albany Trust Company, and by the judge of the Floyd Circuit Court, that upon such presentation, the United States District Court would rescind its said order appointing said Frederick D. Connor, as receiver, and directing him to take possession of said property of M. Zier & Company." Under this authorization he and the Trust Company appeared at Indianapolis on Monday, February 16, and exhibited to the District Court the order of the Floyd Circuit Court authorizing them to appear, and make a full statement of the situation in the State Court, after which and extended argument, the District Judge refused in any way to reconsider, modify or set aside his order, and demanded of the representative of the Trust Company whether or not it would turn over the property, and of defendant and respondent whether or not he, as counsel for the Trust Company, would advise it to turn the property over, to Connor, as receiver.



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"Under these circumstances and not otherwise, and believing that the said demand of said judge of the said United States District Court was peremptory, this defendant and respondent, as counsel for the said New Albany Trust Company, stated that he would advise the said New Albany Trust Company to turn over the said property to the said Frederick D. Connor, receiver." On February 17, defendant and the vice-president of the Trust Company left Indianapolis, and defendant supposed that it was not necessary for any order respecting the hearing in the District Court February 16 and 17 to be entered, and that no order would be entered. But an order was entered, a fact which he learned several days thereafter.

Defendant, further answering, alleged that on February 19 defendant and the Trust Company, receiver, appeared before the judge of the Floyd Circuit Court, in chambers, and defendant, as attorney for the Trust Company, then filed before the judge of that court a written petition and motion, setting forth what had passed at Indianapolis, in view of which he moved to strike out and expunge from the files the petition and order of February 14, 1903. This was particularly desired, because the District Judge seemed to regard the petition and order as offensive. That defendant was in every way in good faith endeavoring to carry out the understanding at Indianapolis, and advised, and at no time gave any contrary advice, the Trust Company to turn over to Connor, receiver, all the property of the Zier Company. The response and plea further averred that Watts was much embarrassed by the condition of affairs and felt that the judge of the Floyd Circuit Court might misconstrue his actions in the premises, and before going to New Albany on February 19, 1903, requested his friend D. A. Sachs, a lawyer residing in Louisville, Kentucky, to accompany him for the purpose of explaining his action to the judge of the Floyd Circuit Court, and this Sachs accordingly did. But the judge of that court was not satisfied, and entered a rule on Watts to show cause "why he should not be punished for contempt."

On the same day the Trust Company filed its separate petition, praying for leave to turn over the property, and for its discharge in the premises on the approval of its accounts. But the judge cited it also to show cause.

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The pleading further set forth the communication of the Trust Company to Connor, receiver, and the delivery of the property to him; and that on February 20 defendant appeared before the judge of the Floyd Circuit Court in obedience to his request. On that day an order was entered removing the Trust Company as receiver, and appointing Charles D. Kelso as receiver in its stead, and authorizing him to demand of Connor the property of Zier & Company. Before that order was entered the Trust Company had, in fact, under the advice of Watts, turned over the property to Connor, and the response and plea asserted that defendant did not advise, aid, connive at, or abet the entry of said order, and had nothing whatsoever to do with it.

The response and plea further set forth the report of Kelso, and the entry of an order directing the issue of a summary writ to the sheriff of Floyd County, and stated: "This defendant and respondent did not procure the entry of said order or connive at its entry or advise its entry, and did not know of its entry until after it had been entered. He had no connection whatever with it."

Defendant and respondent reiterated that all of his acts and doings and advice after his appearance at Indianapolis were with the single purpose of having the Trust Company turn over all the property and effects to the receiver of the District Court, and that he did nothing and said nothing and advised nothing which would in any way delay the execution of that purpose; that he did nothing and said nothing with reference to the removal of the Trust Company or the removal of Kelso, and in no way did he advise anything looking to the retaking of said property from the hands of said Connor, receiver, and with all these matters he had nothing to do. Transcripts of the records were attached as exhibits.

By his separate response and plea, D. A. Sachs denied the commission of any act, or the advising or consenting to the commission of any act, in disobedience of any order of the court in the bankruptcy case, or that he had aided, abetted or advised the taking from the receiver the property of Zier & Company, or in any way disobeyed or disregarded, or aided or abetted the disregarding of, the orders or decrees of the District Court or been guilty of any contempt in the case. He said that he first

heard of the proceedings on February 18 from Mr. Watts, and appeared before the State Judge and attempted to explain the matter simply as his friend. He at no time advised disobedience or disregard of the orders of the District Court or the taking of the property from Connor, but on the contrary advised against that course; and "that all he did in this matter was without fee or any consideration whatever except through friendship to said Watts." He then believed and is still of the opinion that the receiver of the Floyd Circuit Court had the rightful possession of the property and that the District Court did not have the right or authority to interfere therewith in the summary way pursued herein. The response then set forth the various proceedings in both courts, and respondent asserted that on Monday, February 23, 1903, he learned for the first time of the making of the order in the District Court dated February 17. He denied that he had anything to do with the proceedings other than the action he took with a view of extricating Mr. Watts from the complications, and "with a view of avoiding any action that might be justly construed as a violation of the orders of either court." He denied knowledge of a petition or order for the property to be seized, and had nothing whatever to do in any way with the procuring or execution of such an order or with the forcible taking of the property or any part thereof from the receiver.

The responses and pleas having been traversed, evidence, documentary and oral, was adduced at considerable length, and on March 14, 1903, the District Court found Watts and Sachs each guilty of contempt as charged in the information and rules, and sentenced each of them to confinement in the jail of Marion County for sixty days and to pay costs.

In the meantime the property had been restored to Connor, receiver, the \$9600 had been paid over to him, and Zier & Company had been adjudicated bankrupt.

Petitions by Watts and Sachs for writs of *habeas corpus* and of *certiorari*, setting forth the foregoing matters and things, were thereupon presented to this court, leave given to file them, and the writs thereupon issued, and it was directed that each of the petitioners be admitted to bail on his personal recognizance in the sum of \$500, to be entered into before the judge of the United States Court for the District of Indiana.

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Messers David W. Fairleigh, W. H. H. Miller, Bernard Flexner, and W. M. Smith for the petitioners.

Honorable Henry M. Hoyt, Solicitor General for the United States.

Messers George H. Hester, and William Wilhartz, by special leave, for certain interested parties.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

In this matter writs of *certiorari* as well as of *habeas corpus* were issued, and the record returned to us includes the evidence below, which was duly preserved by bill of exceptions. The District Court held that a flagrant contempt of the court in bankruptcy was committed on the twentieth of February by the taking of the property of Zier & Company out of the possession of its receiver, in whose hands, in the view of the court, it had been voluntarily placed; and that defendants Watts and Sachs were so connected with that transaction as to subject them to like condemnation.

The New Albany Trust Company was appointed receiver of the property of Zier & Company under section 1245 of the Revised Statutes of Indiana, Thornton's Rev. Stat. of 1897, providing that this might be done, "when a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;" and it was directed to complete unfinished contracts but to make no new ones. The winding up of the business was contemplated and entered upon. Whether the transfers of \$3100 and \$9600 could have been overhauled in that suit we need not inquire, as they were undoubtedly acts of bankruptcy, and as such justified the application to the Bankruptcy Court. And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the State Courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the State Courts. Such cases are not cases of adverse posses-

sion, or of possession in enforcement of preëxisting liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the District Court brought his appointment to the knowledge of the Floyd Circuit Court and requested the delivery of the assets.

We think there can be no reasonable doubt that the judge of the Floyd Circuit Court and Messrs. Watts and Sachs entertained the conviction in good faith that the custody of the State Court could not be lawfully interfered with by the Bankruptcy Court by summary proceedings. Their view was that the jurisdiction of the State Court having attached, that court was, in all circumstances, entitled to exercise it until voluntarily surrendered. But if the State Court had taken into consideration that Zier & Company had committed acts of bankruptcy in the matter of preferential transfers; that the amendatory bankruptcy act of February 5, 1903, provided that acts of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;" and that the intent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the Bankruptcy Court, it appears to us that instead of continuing the application of the Federal receiver for three weeks, the court should have directed the surrender of the property to him at once, or at least after the report of its own receiver on returning from Indianapolis.

The State Court, however, did not approve of the assurance given by its receiver at Indianapolis, and refused to allow the surrender of possession, so that the delivery to Connor by the Trust Company presently made was unauthorized by the court, whose receiver and officer the Trust Company was.

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take possession *in invitum*, but with the voluntary delivery of property by the officer of a court, without the court's consent, and, therefore, unlawful. We say, "voluntary," for we decline to entertain the suggestion that the District Court intimidated the Trust Company and Watts, or that members of the bar can be intimidated in the discharge of their duty.

It is true that the State Court had authorized the Trust Company and Mr. Watts to appear at Indianapolis and explain the situation, but in doing so it was attempted to limit the operation of the order to a special appearance in the Bankruptcy Court, while by the order continuing the Federal receiver's application it was attempted to make him a party to the proceedings in the State Court and bound by them. Obviously the State Court did not wish its receiver to be bound by going before the District Court, and did wish the receiver of the District Court to be bound by his appearance in the State Court.

On the other hand the District Court made an order on February 17, which recited the presence of the Trust Company and of Watts, the voluntary offer of the Trust Company, with the approval of Watts, in open court, to surrender possession, and then directed Connor to present a certified copy of the order of February 11 to the Trust Company, and thereupon to take possession. Mr. Watts had no notice or knowledge of this order until February 23, and Sachs first saw it on that day, though he was informed of its existence February 22.

The situation February 19 was this: The Trust Company and Watts were under rules to show cause for disregard of the orders of the State Court. One had done, and the other had advised the doing, that which the State Court had not consented to, and it was after it had signified its disapproval that the District Court receiver obtained possession without such consent. The State Court hereupon concluded that it was entitled to restore the *status quo*; and accordingly it entered the orders of February 20, under which Connor was dispossessed.

This was a reassertion of the jurisdiction which the State Court insisted it was entitled to exercise, that it had not voluntarily parted with, or been lawfully deprived of.

The petitioners were sentenced to imprisonment for contempt
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because of their alleged participation in this action of the State Court.

It is the action of the State Court that was complained of, and the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.

But here we do not have the ordinary case of advice to clients, but the case of judicial action alleged to have been induced by the advice complained of. The theory of the condemnation is that of conspiracy between the State Court and the attorneys to obstruct the administration of justice and to bring the authority of the United States Court into contempt.

We are of opinion that such charges ought never to be indulged in, and that the ultimate consequences of attacks of such a character by the courts of one government on the courts of another are too serious to allow them to be made.

The State Court was a court of original general jurisdiction. On the face of its record its jurisdiction had been properly invoked and been properly exercised and was not open to collateral attack. Assuming that the proceedings in bankruptcy superseded further proceedings in the State Court, and that nothing remained for the latter but to direct the surrender of the assets and the winding up of the accounts, the District Court was of opinion that it might by summary proceedings take the assets out of the possession of the State Court. But Connor's possession was not acquired in that way. The contention is that the property was given up voluntarily by the State Court receiver and not in obedience to any order entered on summary proceedings to which that receiver was a party. And the difficulty is that the receiver had no power to make the surrender when it was made. It was the representative of the State Court. The property in its hands was property *in custodia legis*, and it had only such authority as was given to it by the court, and could not exceed the limits prescribed by

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the court. Without doubt the receiver agreed to give up the property in its hands to the receiver of the court in bankruptcy on the supposition that the State Court would assent to its doing so. But the State Court took a different view, and therefore the possession of Connor was from its standpoint a wrongful possession.

In order to the adequate enforcement of the provisions of the bankruptcy law, it is necessary that the powers of courts in bankruptcy should be, as they are, most comprehensive.

Section 720 of the Revised Statutes provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

By section two of the Bankruptcy Act of 1898 the Bankruptcy Courts are empowered to "(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" . . . "(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;" . . . "(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

The twelfth general order in bankruptcy provides: "3. Applications . . . for an injunction to stay proceedings of a court or officer of the United States or of a State shall be heard and decided by the judge."

But no writ of injunction as such was granted in this case. The order of February 11, for the appointment of a receiver, provided that the Trust Company should deliver up the property to the Federal receiver and should refrain from interfering with his possession and control of the same. That order was entered on the application of the Inland Steel Company, which had appeared in the State Court at the creditor's meeting of January 24, and had interposed no objection to the order then entered for the completion of pending contracts and the running of the plant for that purpose. It was one of the con-

tentions in support of the jurisdiction of the State Court that the Inland Steel Company was thereby estopped from resorting to the Bankruptcy Court and obtaining the appointment of a receiver there. In *Simonson v. Sinsheimer*, 95 Fed. Rep. 948, it was held by the Circuit Court of Appeals for the Sixth Circuit, in a careful opinion by Taft, J., that a creditor might be estopped from filing a petition in involuntary bankruptcy, in the circumstances therein detailed, and *In re Curtis*, 91 Fed. Rep. 737, and 94 Fed. Rep. 630, in which a different conclusion was reached, was distinguished. We express no opinion on the matter, but it should be noted, in passing, as one of the elements of controversy entering into the views of counsel in the State Court.

The completion of contracts by the state receiver and the procuring of materials therefor had been authorized at the creditors' meeting, in which the petitioning creditor participated, and the work had been entered upon, and it is possible that a state of facts might have existed which would involve the application of the doctrine of estoppel to some extent.

We do not understand it to be contended that the passage of the bankruptcy act in itself suspended the statute of Indiana in relation to the appointment of receivers, but only that when the proceedings for such appointment took the form, as they did here, of winding up the affairs of the insolvent corporation, the proceedings in bankruptcy displaced those in the State Court and terminated the jurisdiction of the latter. But the acceptance of that view does not necessarily involve the concession that these attorneys were guilty of contempt of the District Court because of the action of the State Court.

They could not be found guilty because they believed and declared their belief that the State Court had jurisdiction and that the District Court had not. Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt. In point of fact the State Court agreed with them, and would certainly not have entered orders of whose validity it entertained any reasonable doubt.

The distinction between the exclusive jurisdiction of the court in bankruptcy, proceeding, as it were *in rem*, to determine the *status* of a debtor and his assets, and the jurisdiction over property subjected to particular liens, and the like, exer-

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cised by courts of concurrent jurisdiction, was probably thought by them not to apply in the circumstances existing here, and advice based on that opinion could not in itself constitute contempt.

What evidence is there that these attorneys, or either of them, gave any advice or took any action in bad faith, not in the honest discharge of their duty as counsel, but with the deliberate intent to have the Federal Court set at defiance and its orders treated with contempt?

When Mr. Watts returned from Indianapolis he had been disabused of his conviction that the District Court would modify its order of February 11, when fully informed of the actual situation of the suit in the State Court, and the participation in the proceedings therein of the creditor on whose application that order had been granted, and he appears to have earnestly sought to bring about the delivery over of the property, the discharge of the Trust Company, and the withdrawal from the record of the petition and order of February 14.

But he realized, when about to appear before the State Court, that his promise to endeavor to bring about the surrender of the property had been made under the pressure of expediency, and not by reason of change of judgment, and that he had placed himself in the embarrassing position of acting without leave and in disregard of the limitations of the order he had himself framed and procured to be entered. This led him to request Mr. Sachs to accompany him as his friend to New Albany, and assist in representing his situation in as favorable a light as possible to the State Court. It is not disputed that Mr. Sachs visited New Albany solely in obedience to the dictates of friendship, and that he had no connection whatsoever with the litigation.

The result was, however, and it might well have been anticipated, that it appeared to the State Court that its jurisdiction had been treated cavalierly by the attorney who had represented the original complainant, who had insisted that the court retained jurisdiction, and who could not deny that he was of the same opinion still. It was then, and on the twentieth, that Mr. Sachs, without the consent or connivance of Mr. Watts, unless suspicion be allowed to supply the want of proof, signed and verified a certain statement by the United States

Tube Company, which represented that the Trust Company had "wrongfully, unlawfully and without leave of this court" turned over the possession to Connor, and prayed for its removal, and the appointment of a successor. This statement is recited in the order of that date entered by the judge of the State Court, disallowing the application of the Trust Company to resign because of its action "without leave or permission," and stating that "the judge of this court, upon his own motion and because of the open contempt of said receiver for the orders, judgment and process of this court, does now order and direct that said receiver be and it is hereby removed from its trust." The Trust Company was ordered to account immediately for all the assets, and Kelso was appointed as receiver in succession by the judge "upon his own motion," and directed to demand possession of the property, and in case of refusal to report to the judge for further action in the premises. This was followed by the qualification of the new receiver, the demand on Connor, the report of his refusal, the issue of the writ to the sheriff, and its execution.

Mr. Sachs testified that on the 19th the judge of the Circuit Court insisted on retaining the property and in declining to approve of the promise Mr. Watts had made; that when it was known that the property had been delivered the judge still declined to discharge Mr. Watts; that on the forenoon of the 20th the judge announced that he had made up his mind to remove the Trust Company and appoint another receiver; that he, Sachs, expressed the opinion that if the judge did that the better procedure would be for the new receiver to interplead in the District Court, setting up all the facts from the beginning and obtaining a determination in that court; that the judge asked Kelso to bring the facts in respect of the delivery of the plant to the official knowledge of the court, when he would remove the Trust Company and appoint Kelso. That in the afternoon Kelso desired him to sign the statement bringing the facts to the court's notice, which he, Kelso, objected to doing because he was to be appointed receiver, and Sachs signed it supposing the course to be followed would be an application to the District Court in the nature of an interpleader; that he did not know what became of the paper and did not know, until after the commencement of the pending proceed-

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ings, what order had been entered upon it; that he did not know that any proceedings were contemplated or in course of preparation or prepared with the view of retaking the property; and did not advise or assist in any such, or believe any such would be undertaken.

In seeking to extricate Mr. Watts from his anomalous position, Sachs found himself involved, by the attitude of the State Court, in similar embarrassment, for the State Court adhered to its views as to jurisdiction, and insisted that it had never voluntarily yielded the position it occupied, which afforded the basis for testing the question. It does not seem to have occurred to Sachs that the mere effort to get an issue which could be transmitted to the District Court for determination subject to petition for review or such other appellate remedy as the bankruptcy act provided, could be regarded as contempt of that court, and want of intention to commit contempt is entitled to great weight in such circumstances.

There is some conflict of evidence as to Sachs' participation by way of suggestion in the preparation of papers on the twentieth, or knowledge of the preparation of the final order and writ, but, without attempting to review the evidence and pass upon its weight, we find nothing in this conflict to justify the conclusion of an intention to contemn.

State Courts are entitled to the assistance of the gentlemen of the bar in the maintenance of their dignity and jurisdiction, and the fearless discharge of their duty by the latter should not be shaken by liability to punishment for mere errors of judgment in rendering such assistance.

The presumption on the verified response and plea of Sachs, which was sustained by his testimony, was that he had not been in any way a party to the dispossession of Connor, and had not advised it or expected it; that he not only had not intended any contempt, but had committed none. And as the record of the State Court showed that the orders were entered by the judge of that court "upon his own motion," that presumption could not be overthrown without collaterally impeaching the record, and that we think was inadmissible.

It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the State Court, but it remained for the State Court

to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way.

We cannot but express our regret at the unfortunate collision between the two courts and the belief that the considerate observance of the rule of comity is adequate to avert such occurrences.

We are of opinion that there was no legal evidence to sustain these convictions for contempt, and the order in each case must be

Petitioner discharged.

MR. JUSTICE HARLAN, concurring.

I concur in that part of the opinion of the court which shows that there was no evidence whatever upon which to base a judgment for contempt against Watts and Sachs, or either of them. That view of the evidence is sufficient to dispose of the case without reference to any other question arising on the record. My concurrence in the judgment discharging the petitioners is solely on the ground just stated.

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BURGLARY.

Introductory review by J. F. G.

By the common law, burglary was regarded as a very great crime and was met with severe punishment. Generally speaking, a burglary was an unlawful breaking and entering into the dwelling-house of another, in the night-time, with intent to commit a felony. Very wisely the common law, in this regard, defined the term night-time as—a time when a man's countenance could not be discerned by the natural light of day,—hence—the mere setting of the sun was not regarded as an introduction of the night, nor did the brightness of the moon, excuse the burglar from the severer penalties of that crime. Night-time was considered to cover that period, when the people retiring from the activities of the day, had closed their doors against the public, and were resting from their labors, in that peaceful security so zealously guarded by the Anglo Saxon laws and traditions. (See notes to *State v. Miller*, *post*, 121.)

To constitute a burglary, the breaking and entering must be with intent to commit a felony. An intent simply to commit a misdemeanor or a trespass is not sufficient.

Generally speaking, an occupied dwelling-house alone was a proper subject of burglary; but this rule was not confined to the walls of the house, but extended to buildings within the curtilage, i. e., the immediate enclosure connected with the house; also, a church was considered a building within the rule as to burglary; but as to these and other features, see, review of Sir Mathew Hale, incorporated into these notes.

In this country, the law relating to the crime of burglary has been subjected to many statutory enactments by the legislatures of various States, which renders the subject too complex to receive an extended review at this place; however, as these various and dissimilar statutes should, at least to some degree, be construed in the light of the common law, we incorporate into these notes the able review of the subject by Sir Mathew Hale as it appears in his *Pleas of the Crown*, together with foot notes, and marginal page numbers. For convenience, the foot notes are placed at the end of the chapter and indexed by figures, instead of letters as they appear in the *Pleas of the Crown*. From the context of several of them, these foot notes seem to have been subjected to editorial revision:—the work being first published some years after the death of Lord Hale.

On pages 18 and 19 of the 13th American Criminal Report we gave a biographical sketch of Lord Hale together with his rules for judicial

guidance, into which two errors crept, unnoticed by the proof reader; but which we here correct as follows:—

On page 18, the words "Magdalah Hall" should read:—Magdalan Hall.

On page 19, in giving the fourteenth rule for his judicial guidance the sense is destroyed by the word, *justice* being printed instead of *injustice*. The paragraph should read as follows:—

XIV. In criminals that consist merely in words when no more harm ensues, moderation is no *injustice*.

The following is Chapter XLVIII of *I Hale's Pleas of the Crown*, followed by several English cases on the same subject:

CHAPTER XLVIII.

OF BURGLARY, THE KINDS, AND PUNISHMENT.

I come to those crimes that specially concern the habitation of a man, to which the laws of this kingdom have a special respect, because every man by the law hath a special protection in reference to his house and dwelling. (1)

And this is the reason, that a man may assemble people together for the safeguard of his house, which he could not do in relation to travel, or a journey. 21 H. 7. 39. a.

And upon the same reason it is, that not only by the statute of 24 H. 8 cap. 5 but even by the common law, if any come to commit a felony upon me in my house, and I kill him, it is no felony, nor induceth any forfeiture; *quod vide supra*, p. 487, *vide Sir Henry Spelman Gloss*, tit. *Hamsecken*, & *ibidem* tit. *Burglaria*, whereby it appears, that by the antient laws of *Canutus*, (2) and of H. 1. (3) it was punished with death.

The common genus of offenses that comes under the name of *Hamsecken*, is that which is usually called house-breaking, which sometimes comes under the common appellation of *burglary*, whether committed (548) in the day or night to the intent to commit felony, so that house-breaking of this kind is of two natures.

1. That which in a vulgar and improper acceptation is sometimes called burglary. And,

2. That which in a strict and legal acceptation is so called.

I. As to the former of these, *Hamsecken*, house-breaking, or burglary in a vulgar acceptation is of several kinds.

1. Robbing any person by day or night in his dwelling house, the dweller, his wife, children, or servants being in the house, and put in fear; this requires that there be something taken, but it requires not an actual breach of the house; but it is all one, whether he actually breaks the house, or enters *per ostia aperta*, for it is in truth robbery either way, and from this offense clergy is taken away by the statute of 23 H. 8 cap. 1. and 25 H. 8. cap. 3. from the principal, and by the statute of 4 & 5 P. & M. cap. 4, from the accessory.

2. Robbing a person by day or night in his dwelling-house. the dweller, his wife or children being in the house, and not put in fear; this requires,

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2. An actual breaking of the house. 2. An actual taking of something, but the persons need not be put in fear; and by the statute of 5 & 6 E. 6. cap. 9. clergy is in this case taken from the principal, that enters the house; and by the statute of 4 & 5 P. & M. cap. 4. from the accessory before.

3. Robbing a dwelling-house by day or night, and taking away goods, none being in the house; this requires an actual breaking, and an actual taking of something, and without the latter it is not felony, but if accompanied with both, and the taking of goods be of the value of five shillings, it is excluded from clergy by 39 Eliz. cap. 15.

4. A breaking of the house in the day or night to the intent to steal or commit a felony, any person being in the house, and put in fear, tho nothing be actually taken, this is burglary by the common law, if it is in the night, and felony by the statute of 1 E. 6 cap. 12. tho in the day, and is excluded from clergy by the statute of 1 E. 6 whether by day or by night, but then it requires. 1. An actual breaking of the (549) house, and not an entry *per ostia aperta*. 2. An entry with intent to commit a felony, and so laid in the indictment *Poulter's case*, 11 Co. Rep. 31 b.

3. A putting in fear, but accessories have clergy.

II. Legal or proper burglary is of two kinds, viz. 1. Complicated and mixed with another felony, as breaking the house, and stealing goods, either with putting in fear or without putting in fear, somebody in the house, or nobody in the house, which requires, 1. That it be done in the night. 2. That there be an actual breaking.

2. Simple burglary, and that either, 1. With putting in fear, and then the principal is excluded of clergy by the statute of 1 E. 6. and also by the statute of 18 Eliz. or 2. Without putting in fear, and then he is excluded of clergy by the statute of 18 Eliz.

And this chapter speaks only of proper or legal burglaries, of those improper burglaries I have spoken before.

Burglary is described by Sir Henry Spelman (4) to be *nocturna diruptio alicujus habitaculi vel ecclesiae, etiam murorum portarumve civitatis aut burgi ad feloniam perpetranda*.

My lord Coke P. C. cap. 14. p. 63. more fully describes it. "A burglar is he, that in the night-time breaketh and entreth into a mansion-house of another of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.

And accordingly the indictment runs, quod J. S. 1 die Julii anno &c. in nocte ejusdem diei vi & armis domum mansionalem A. B. felonice & burglariter fregit & intravit, ac ad tunc & ibidem unum scyphum argenteum &c. de bonis & catallis ejusdem A. B. in eadem domo invent felonice & burglariter furatus fuit, cepit & asportavit; or if no theft were actually committed, then ex intentione ad bona & catalla ejusdem A. B. in eadem domo existent' felonice & burglariter furandum capiendum & asportandum, or ea intentione ad ipsum A. B. ibidem felonice interficiendum contra pacem &c.

And note, that these several clauses in the indictment are essential to

the constitution of burglary, 1. That it be said *noctanter*, or in *nocte ejusdem diei* (5) for if it be in the day-time it is not burglary. 2. (550) That it be said in the indictment *burglariter*, for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or other circumlocution, and therefore, where the indictment is *burgaliter* instead of *burglariter*, it makes no indictment of burglary, so if it be *burgenter*, 4 Co. Rep. 39 b. (6).

3. It must be *fregit & intravit*, for it is held that breaking without entring or entring without breaking makes not burglary, *sed de hoc infra*; yet Trin. 5 Jac. B. R. an indictment, *quod felonice & burglariter fregit domum mansionalem &c.* was a good indictment of burglary, and that the entry is sufficiently implied, even in an indictment, by the words *burglariter*, *fregit*, but the safest and common way is to say *fregit & intravit*.

4. It must be said *domum mansionalem*, where burglary is committed in a house, and not generally *domum*, for that is too uncertain, and at large.

5. It must be alleged, that he committed a felony in the same house, or that he brake and entred the house to the intent to commit a felony, but these things will be fuller examined, when we come to particulars.

1. Therefore the time, wherein it must be committed to make it burglary, must be in the night.

It hath been antiently held, that after sun-set, tho day-light be not quite gone, or before sun-rising is *noctanter* to make a burglary, Dalt. cap. 99 p. 352, (7) and accordingly cited by Crompt. fol. 32. b. to have been judged by Portman, 3 E. 6., (8) and the felons executed, and 21 H. 7 Kew. 75. a.

But the latter opinion hath been and still obtaineth, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun or *crepusculum*, it is not night, nor *noctanter* to make a burglary; and with this agrees Co. P. C. p. 63 and hence it is, that altho a town unwall'd shall not be amerced for the escape of a murderer, if the murder were committed in the night, yet if it were done only in *vespere diei*, the township shall be amerced. 3. E. 3 Coron. 293. And

(551) if a robbery be committed before sun-rising, or after sun-set, whilst

it is so far day-light, that the countenance of a man can be reasonably discerned by the light of the day, yet the hundred shall be charged, otherwise where it is done in the night 7 Co. Rep. 34 Milburn's case; but this is not intended of moonlight for then midnight house-breaking should be no burglary; and the word *noctanter* is to be applied to all that follows, *vis. fregit & intravit*, if the breaking of the house were in the day-time, and the entring in the night, or the breaking in the night, and entring in the day, this will not be burglary, for both make the offense, and both must be *noctanter*: vide Crompt. 33. a. ex. 8 E. 4. (9).

But if they break a hole in the house one night, to the intent to enter another night and commit felony, and accordingly they come at another night, and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entring were both *noctanter*; tho not the same night; and it shall be supposed, that

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they brake and entred the night when they entred, for the breaking makes not the burglary till the entry.

2. There must be a breaking and an entry to make the burglary, and therefore I shall speak of them both together.

Antiently the law was so strict against burglary, that the very coming to a house with intent to commit a burglary was held punishable with death, *Crompt.* 31 by Sir *Anthony Brown*; but that obtains not now for without a burglary committed.

Fregit, there is a double kind of breaking, 1. In law, and thus every one that enters into another's house against his will, or to commit a felony, tho the doors be open, doth in law break the house, 2. There is a breaking in fact an actual force upon the house as by opening a door, breaking a window, &c.

And altho, in the remembrance of some yet alive, Sir *N. H.* (10) chief justice did hold, that a breaking in law was sufficient to make a burglary, as if a man entred into the house by the doors open in the (552) night, and stole goods, that this is burglary, and accordingly is *Crompt.* 32. a. 27 *Acis.* 38, yet the law is, that a bare breaking in law, *viz.*, an entry by the doors or windows open is not sufficient to make burglary without an actual breaking, *Co. P. C.* p. 64 and so the law hath been generally taken to this day in case of burglary. (11).

And these acts amount to an actual breaking, *viz.* opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger, *Dalt. cap.* 99. (12) *Crompt.* 33. a. and so is common experience.

To take down a pane of glass of a glass-window by taking out or bending aside the nails that fasten it is a breaking of a house within this law, because the glass-window is parcel of the house.

It was held by *Manwood* chief baron, that if a thief goes down a chimney to steal, this is a breaking and entring, *Crompt. fol.* 32. b. and hereunto agrees Mr. *Dalton*, p. 253 (13).

There was one arraigned before me at *Cambridge* for burglary, and upon the evidence it appeared, that he crept down a chimney; I was doubtful whether this were burglary, and so were some others; but upon examination it appeared, that in his creeping down some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question, and direction was given to find it burglary; but the jury acquitted him of the whole fact.

In some cases there may be a burglary committed by a man without an actual breaking.

Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary, (14) *Co. P. C.* p. 64. The like happened in *Black Fryars* 1664, where thieves pretending that *A.* harboured traitors, called the constable to go with them to apprehend him, and the constable entring, they bound the constable, and robbed *A.* and were executed for burglary, and

yet in both cases the owner opened the doors of his own accord, at the command of the constable. *Cromp.* 32. b.

Thieves come in the night to rob *A.* who, perceiving it, opens his door and issues out and strikes one of the thieves with a staff, another thief having a pistol in his hand, perceiving others in the entry ready to interrupt them, puts his pistol within the door over the threshold, and shot, so that his hand was over the threshold, but neither his foot, nor the rest of his body, and upon this evidence by great advice it was adjudged burglary, and the thief hanged, and yet he brake not the house. 26 *Eliz.* *Cromp.* 32. a.

If *A.* the servant of *B.* conspire with *C.* to let him in to rob *B.* and accordingly *A.* in the night-time opens the door or window, and lets him in, this is burglary in *C.* but larciny in *A.* the servant, *Dalt. cap.* 99 p. 253, (15) it seems it is burglary in both, for if it be burglary in *C.* it must needs be so in *A.* because he is present, and aiding to *C.* to commit this burglary.

If *A.* enter the house of *B.* in the night-time, the outward door being open, or by an open window, and when he is within the house, turns a key of a door of a chamber, or unlatcheth a chamber door to the intent to steal, this is burglary, tho the outward door were open; and so it was adjudged upon a special verdict before me at the sessions at *Newgate* 1672, by advice of many judges then also present.

And so it is, if a thief be lodged in an inn, and in the night he stealeth goods, and goeth away, or if he enter into the house secretly in the day-time, and there stayeth till night, and then steals goods and goes away, this is not burglary, *Dalt. ubi supra* p. 253. and *Cromp.* 34 a. but if in either of the cases they had opened an inner chamber door, and taken the goods, it had been burglary, agreed 1672. (16).

The servant lies in one part of the house, the master in another and (554) the stair-foot door of the master's chamber is latched; the servant came in the night, and unlatched the stair-foot door, and went up into his master's chamber with a hatchet intending to kill him, and wounded him dangerously, but the master escaped (17). Upon this special matter found at *Winchester* assizes, by the advice of the greater number of the judges *exceptis paucis*, (18) it was adjudged burglary, and the offender was executed *T.* 16 *Jac. Hutt. Rep.* the case of *Haydon* and *Edmunds*. (19).

If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary against the opinion of *Dalt.* p. 253. (20) out of *Sir Francis Bacon*, *for fregit & exiit, non fregit & intravit*. (21).

If *A.* be a lodger in an inn, and he goes up to his chamber to bed, and the chamberlain pulls to the door and latcheth it, or *A.* himself locks it, and in the night he riseth, openeth his chamber door, steals goods in the house, and goes away, it may be a question, whether this be burglary; it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was not breaking of the inn-keeper's house, for *A.* hath a special property in his chamber; but

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if he had opened the chamber of *B.*, a lodger in the inn, to steal his goods, this had been burglary.

And in that case of a lodger, tho he hath a special interest in the chamber, yet he being but a lodger, and in an inn, the burglary must be supposed of the mansion-house of the inn-keeper: (22) *vide plus infra*.

If *A.* enter into the house of *B.* in the night, by the doors open, and breaks open a chest, and takes away goods without breaking open of an inner door, this is no burglary, because the chest is no part of the house (23).

But if he breaks open a study or counting-house, or shop within the house, this is burglary, tho none usually lodge in the study; (555) and the same law seems to be, if he break open a cupboard or counter fixed to the house: (24) *quaere*.

3. *Fregit & intravit*. There must be an entry as well as a breaking, and both must be in the night, and with an intent to steal, otherwise it is no burglary.

A. intending to rob *B.* breaks a hole in his house, but enters not, *B.* for fear, throws out his money to him, *A.* takes it and carries it away, this is certainly robbery, and some have held it burglary tho *A.* never entered the house; and so it is reported to have been adjudged by *Saunders* chief baron. *Crompt. 31 b. tamen quaere*. (25).

If *A.* breaks the house of *B.* in the night-time, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine to reach out goods, or puts a pistol in at the window with an intent to kill, tho his hand be not within the window, this is burglary. *Co. P. C. p. 64 Vide infra*.

But if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary: *quaere*.

A. B. and *C.* come in the night by consent to break and enter the house of *D.* to commit a felony, *A.* only actually breaks and enters the house, and *B.* stands near the door, but actually enters not, *C.* stands at the lane's end, or orchard gate, or field gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others, if help comes, this is burglary in them all, tho *A.* only actually brake and entered the house, and they all, in law, are principals, and excluded from clergy by the statute of 18 *Eliz. cap. 7.* and so it is in robbery, as hath been said 11 *H. 4. 13. b. Cromp. 32. a. Co. P. C. p. 64.*

If *A.*, being a man of full age, take a child of seven or eight years old, well instructed by him in this villainous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to *A.* who carries them away this is burglary in *A.* tho the child (556) that made the entry, be not guilty by reason of his infancy.

So if the wife in the presence of the husband, by his threats or coercion, breaks and enters the house of *B.* in the night, this is burglary in the husband, tho the wife, that is the immediate actor, is excused by the coercion of her husband.

4. *Domum mansionalem*: what shall be so said.

An indictment, *quod felonice & burglariter fregit & intravit ecclesiam prochiale, de D. ea intentione, &c.* is a good indictment for burglary.

for *ecclesia* is *domus mansionalis*. Co. P. C. p. 64, Dy. 99. a. (26).

If *A.* have a dwelling-house, and upon occasion he and all his family, are absent a night or more, and in their absence in the night a thief breaks and enters the house to commit felony, this is burglary. Co. P. C. *ubi supra*.

So if *A.* have two mansion houses, and is sometimes with his family at one, and sometimes at the other, the breach of one of them in the absence of his family from thence is burglary. (27) 4 Co. Rep. 40 a. 39 Eliz. Dalt. cap. 99 p. 254 (28).

If *A.* have a chamber in a college or inn of court, where he usually lodgeth in term-time, and in his absence in the vacation his chamber or study be broken open, &c. this is burglary, and the indictment shall suppose it *domus mansionalis* *A.* Co. P. C. p. 65, 14 Car. 1. Audley's case before cited. (29).

So it is, if *A.* hires a chamber in the house of *B.* for a certain time wherein he lodgeth, and during the time contracted for, it is broken open, &c. this is burglary and the indictment shall suppose it to be *domum mansionalem* of *A.* (30).

But if, in the king's house at *Whitchalk*, or in the great house of any nobleman, there be apartments or lodgings assigned to the jeweller, treasurer, steward, chamberlain, &c. and any of these lodgings be broken up burglarly, the indictment must suppose it to be *domus mansionalis* of the king or of him that is truly lord or proprietor of the house, for they have the use of the lodgings as servants only, and not as owners; *Hungate's* case before cited. (31.)

And so it is if *A.* comes to the inn of *B.* and there hath a chamber appointed for his lodging, and this chamber is broken up burglarly, it shall suppose it to be *domus mansionalis* of *B.* the inn-keeper, because the interest is in him, and *A.* hath only the use of it for his lodging without any certain interest.

A tent or booth in a fair or market is not such a *domus mansionalis* wherein burglary may be committed, but robbery therein committed, the owner, his wife or servants being therein, is especially exempted from clergy by the statute of 5 & 6 E. 6 cap. 9 before mention'd. Co. P. C. p. 64.

If *A.* have a shop parcel of his mansion-house, and it is to be broken open in the night, &c. it is a burglary, and the indictment shall suppose, that he brake and entred *domum mansionalem* of *A.* for it is parcel thereof.

But if *A.* let the shop to *B.* for a year, and *B.* holds it, and works or trades in it, but lodgeth in his own house at night, and this shop is broken open, &c. the indictment cannot be, that *domum mansionalem* of *A.* *fregit*, for it was severed by the lease during the time, (32) but then whether he may be indicted for burglary as in the *domus mansionalis* of *B.*? and certainly it is agreed on all hands, if *B.* or his servant sometimes lodge in the shop, it is burglary, and it shall be supposed *domus mansionalis* of *B.* and this common experience.

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therein in the day time, and he or his servants never lodge there (556), at night, whether this be a burglary to break and enter this shop to commit a felony?

And certainly it was in this case antiently held burglary, *M. 37 & 38 Eliz. B. R. Cole's case* (33) an indictment, *quod shopam cujusdam, Ricardi burglariter et felonice fregit & intravit &c.* it was admitted for the matter by the court of king's bench to be good; but doubted, whether it was good, because it was *cujusdam Ricardi* without mentioning his surname, and with this also agrees my lord Coke in *terminis, Co. P. C. p. 64* in these words. *But a shop wherein any person doth converse, being parcel of a mansion-house or not parcel, is taken for a mansion-house.*

But *T. 17 Jac. Hutton's Rep. 33.* it is ruled to be no burglary to break open such a shop, and accordingly the practice hath always gone at *Newgate* sessions since my time or observation, and to this day it is holden no burglary to break open such a shop; but if the shop keeper, or his servant, usually or often lodge in the shop at night it is then *domus mansionalis*, in which a burglary may be committed.

Domus mansionalis doth not only include the dwelling-house, but also the out-houses, that are parcel thereof, as barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, tho they are not under the same roof, or joining contiguous to it; and therefore, if such stable or out-house belonging to the dwelling-house be broken open in the night-time with intent to steal, it is burglary, and with this agrees *Co. P. C. p. 64 65 Dalt. cap. 99 p. 254, 255.* where for breaking open a back-house of *Robert Castle's*, eight or nine yards distant from the dwelling house, only a pale reaching between them, two were arraigned and condemned for burglary; and so it was agreed by all the judges in the time of chief justice Hyde last 1665, and the law was accordingly, and the contrary practice in *one* much blamed; and altho it was said by some, that it had not been so used, and that the statute of 4 & 5 *P. & M. cap. 4* distinguished between a dwelling-house and a barn, yet at length all the judges agreed, that the felonious breaking of a (559) barn, parcel of a messuage, to steal corn, was burglary according to my lord Coke, *ubi supra*, and with this agrees 2 *E. 6 B. Corone* 180.

But if the barn, or stable, or cow-house, be no parcel of the messuage, as if a man takes a lease of a dwelling-house from A. and of a barn from B. or if it be far remote from the dwelling-house, and not so near to it as to be reasonably esteemed parcel thereof; as if it stands a bow-shot off from the house, and not within, or near the curtilage of the chief house, then the breaking of it is not burglary, for it is not *domus mansionalis*, nor any part thereof.

An indictment that *noctanter clausum* or *cartilagium felonice & burglariter fregit ad occidendum* or *furandum* is not good, and yet 22 *Assiz. 95* burglary is defined to *break houses, churches, walls, courts, or gates in time of peace.* (34).

So that by that book it should seem, that if a man hath a wall about his house for its safeguard, and a thief in the night break the wall or the

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gate thereof, and finding the doors of the house open, he enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court, and found the door of the house open; then it had been no burglary.

5. To make up burglary, it must not be only to break and enter a house in the night-time, but either a felony must be committed in the house, or it must be to the intent to commit a felony.

If the indictment be, *quod domum mansionalem J. S. felonice & burglariter fregit & intravit, & ad tunc & ibidem* certain goods of *J. S. felonice & burglariter furatus fuit, cepit & asportavit*, the indictment compriseth two offenses, *viz.* burglary and felony, and therefore he may be acquitted of burglary, if the case be so, upon the evidence, and found guilty only of the felony, and then he shall have his clergy.

Or he may be acquitted of the felony, but then *quaere*, whether (580) he can be found guilty of the burglary, because tho where the indictment compriseth burglary and felony, the indictment is good tho it be not supposed in the indictment, that it was *ca intentione ad bona furandum*, for the act of theft being charged at the same time, it is a sufficient evidence of his intention; but when he is acquitted of the felony, then, there being nothing expressly charged in the indictment, that *burglariter fregit &c. ca intentione ad bona &c. felonice furandum*, it stands single as if the indictment had been of single burglary, in which case the clause of *ca intentione ad furandum &c.* had been necessary to complete a single burglary.

It seems therefore necessary in such case not only to charge him, that in *nocte & burglariter & felonice domum &c. fregit and intravit, & bona &c. cepit*, but also farther to say *ca intentione ad bona & catalla &c. in eadem domo existentia felonice & burglariter furandum*, and to add also the particular felony, *& ad tunc & ibidem unum scyphum argenteum &c.* and then, tho he be acquitted of the felony, the rest of the indictment stands good against him as a simple burglary, and he may be convicted of it, though acquitted of the felony.

And I think that as the offenses of burglary and felony may be joined in the same indictment, so three offenses may be joined in the same indictment, and if he be acquit of the one, he may be convicted of the other two, and it may be of use to exclude a malefactor of his clergy where the offense is great, as namely for burglary, for felony, and for felony upon the statute of 5 & 6 E. 6. cap. 9. for there may be an offense against that statute which will exclude from clergy, and yet not amount to burglary; and the form of the indictment may run thus, *Quod. A. prima die Februarii anno regni domini Caroli &c. in nocte ejusdem diei vi & armis apud B. felonice & burglariter domum mansionalem fregit & intravit ea intentione ad bona & catalla ejusdem B. in eadem domo existentia felonice and burglariter furandum, capiendum & asportandum, & ad tunc & ibidem vi & armis unum scyphum argenteum ejusdem B. in eadem domo existentem felonice & burglariter furatus fuit, cepit & asportavit, ipso B. ac uxore, liberis & famulis suis in eadem domo tunc existentibus, contra pacem, &c.*

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And note, that such an indictment need not conclude *contra formam statuti*, it is sufficient that it brings the case so within the (561) statute, as to exclude clergy; and so, upon the statute of 23 H. 8. cap. 1.

And upon this indictment, if it falls out upon the evidence that he is guilty of the burglary, but not guilty of the stealing, he may be convicted of the burglary, and so ousted of clergy, though he be found not guilty of the felony: again, tho he be found not guilty of the burglary, because, it may be, the breach of the house was in the day-time, the dweller, his wife or servants in the house, yet he may be found guilty of the felony within the qualifications contained in the indictment pursuant to the statute of 5 & 6 E. 6. and so ousted of his clergy, for that is not confined either to the day or night; again if upon the evidence it appears not to be burglary, because done in the day-time, nor yet felony so qualified as is excluded from clergy, because either there was no act of breaking, or if there were, yet the dweller, his wife or servants were not in the house, he may be convicted of common larciny and so have benefit of clergy.

And so much for burglary joined with larciny.

Simple burglary is where the breaking and entering is *ea intentione ad bona & catalla furandum* or *ad interficiendum*, &c. and this clause as it is usually added in cases of simple burglary, so it is necessary; and hereupon these things are observable.

1. That altho the breaking and entering be charged to be done *burglariter*, yet if the intention of the entry be either laid in the indictment, or appears upon the evidence to be to the intent only to commit a trespass and not a felony, as *ea intentione ad ipsum A. ad tunc & ibidem verberandum* it is no burglary, but it must be laid and proved to be *ea intentione* to steal or to kill, or to commit some other felony, for tho the killing or murder may be the consequence of beating, yet, if the primary intention were not to kill, the intention of beating will not make burglary. *Co. P. C. p. 65. 13 H. 4. 7. b.*

2. That if a man in the night break and enters a house to the intent to commit a felony, tho he attains not that intent, but takes or steals nothing, this is burglary, and excluded from clergy. 22 *Assiz.* 39 (562) & 95 *Dy.* 99. *Crompt.* 31. *a. Coron.* 264. *Stamf. P. C. p. 30. a. Co. P. C. p. 63.* and herein it differs from robbery.

3. It seems, that the intention to commit a felony to make a burglary must be an intention of such a fact, as was felony by the common law (and not of a felony newly made by act of parliament), as larciny, or homicide.

It hath been therefore doubted whether the breaking of a house in the night with intent to commit a rape be burglary or not, *Crompt. fol. 32.* thinks it is not, because, made felony by the statute of *Westm. 2 cap. 34. (35)* but *Dalt. cap. 99. p. 255. (36)* thinks it would be burglary; because rape was felony by the common law until the statute of *Westm. 1. cap. 13 (37)* which turned it into a trespass punishable by two years' imprisonment, and so the statute of *Westm. 2.* was but a restitution of the common law, and a setting aside of the statute of

Westm. 1. and this seems to be the more warrantable opinion that it is burglary; but of this hereafter.

Now as to clergy in case of burglary.

If it be such a burglary, as is also joined with actual theft or robbery, and that robbery or theft be so laid in the indictment, and proved upon evidence, as answers the statute of 23 *H. 8. cap. 1.* or 1. *E. 6. cap. 12.* or 5 & 6 *E. 6. cap. 9.* whereof enough hath been said before, then the principal in such burglary is in those cases, which are within those statute, ousted of his clergy, and the accessaries *before* are ousted of their clergy by the statute of 4 & 5 *P. & M. cap. 4.* but the accessories *after* have their clergy, as hath been said; but in case of simple burglary, or burglary with theft, laid to be only *felonice & burglariter*, the principal is ousted of clergy if outlawed or convict by verdict or confession, but is not ousted of clergy in case of standing mute, not directly answering; or challenging above twenty, by the statute of 18 *Eliz. cap. 7.* (38).

But by the statute of 1 *E. 6. cap. 12.* "If the breaking of the house (563) be in the day or night time with intent to rob or steal, any person being in the house and put in fear, tho nothing be stolen, yet he shall be ousted of his clergy, if convict by verdict or confession, or stand mute, or challenge preemptorily above twenty;" (39) for this statute extends to this special kind of burglary 11 *Co. Rep. 36 b. Poulter's* case, tho nothing be stolen, and so differs from the statutes of 23 and 25 *H. 8.* which require a stealing, as well as a breaking the house.

But tho in case of robbery in any dwelling-house and therewith putting in fear, according to the statute of 23 *H. 8. cap. 1.* or without putting in fear, according to the statute of 5 & 6 *E. 6. cap. 9.* the malicious commanding, hiring or counseling of such offense is put out of clergy, if so specially laid in the indictment, *Dy. 133. b.* by the statute of 4 & 5 *P. & M. cap. 4.* yet such accessories *before*, are not oust of clergy in case of breaking a house to commit a robbery putting in fear, tho the principal be ousted of clergy by 1. *Eliz. cap. 12.*

But accessaries *before* or *after* are not ousted of clergy by this statute, or the statute of 4 & 5 *P. & M. cap. 4.*

And this statute doth oust of clergy not only those that actually break or actually enter the house, but also all those that are, in law, principals in burglary, all those that are present, aiding and assisting, or that stand to watch at the field-gate, while the others of the confederacy or company break and enter the house.

And so it differs from the case of robbing of a person in his dwelling house, none being within, upon the statute of 38 *Eliz. cap. 15* for that statute excludes from clergy only those persons that actually enter into the house, and not those who, tho of the confederacy, and present aiding and abetting, yet never entered the house; *quod vide supra.*

But as to accessaries *before* or *after*, they are not ousted of their clergy, by the statute of 18 *Eliz. cap. 7.* nor doth the statute of 4 & 5

P. & M. extend to oust accessaries *before* of clergy in cases of (564) burglary; (40) but in cases of robbing of houses within the

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qualifications and circumstances of the statute of 23 H. 8. cap. 1 or 5 & 6 E. 6 cap. 9. and not to burglary, at large. (41)

And thus far concerning larciny, robbery, and burglary, which are felonies by the common law. (565)

There are two exceptions, that are added hereunto.

1. The first is really true, namely when it is *tempus belli* within the kingdom, and one enemy either steals, robs or plunders the house or goods of another, and therefore the book of 22 Assiz. 95. adds to the definition of burglary *in time of peace, for in time of war, tho* these kinds of offences committed by those of the same party, or those that are not in hostility one to another are felonies, yet in time of war, when done by an enemy, they put on another name, as acts of hostility, misprisions, and the like.

Jusque datum sceleris.

2. The second is only supposititious, namely when it is done in case of necessity, (42) as a poor person that in case of necessity for hunger shall break and enter a house for victuals under the value of twelve pence, which is added as an exception to burglary, by *Crompt. fol. 33 a. and Dalt. cap. 99. p. 255, 256* (43) for tho I do agree a judge ought to be tender in such cases, and use much discretion and moderation, yet this must not pass for law, for then we shall in a little time let loose all the rules of law and government, and burglaries, robberies, yea murders themselves shall be excusable under pretense of necessity, and we shall fall within the wild doctrine of the *Jesuitical casuists*, who of late in France and elsewhere upon those general misapplied maxims of *Quicquid necessitas cogit, defendit*, and in *casu extremæ necessitatis omnia sunt communia*, have advised servants and apprentices, that (566) it is lawful in point of conscience to steal from their master, or rob them in case they make not sufficient allowances of meat, drink, or clothes: where laws are settled, there are other remedies appointed for the relief of servants against oppressing masters, and of the poor, by complaint to the magistrates without violating the established laws of kingdoms or states. (44)

(1) That this was the notion among the Romans also appears from Cicero in *oratione pro domo, cap. 41. Quid enim sanctius, quid omni religione munitius quam domus unius-cujusque civium? Hic aræ sunt, hic soci,—hoc perfugium est ita sanctum omnibus, ut inde abripi neminem fas sit.*

(2) l. 61. reckons *irruptio in domum* among the *scelera inexpiabilia*.

(3) l. 80. See *Wilk. Leg. Anglo-Sax. p. 273.*

(4) *In verbo burglaria.*

(5) See 9 Co. 66. b.

(6) See also 5 Co. 121 b.

(7) *New Edit. cap. 151 p. 486.*

(8) See the like judgment *per Fineux, Crompt. 33. a.*

(9) This case does not fully prove the point it is brought for, for

the resolution there was only, that if thieves enter in by night at an hole in the wall, which was there before, it is not burglary, but it does not appear who made the hole.

(10) *Sir Nicholas Hyde*, see *Cro. Car.* 65. 225.

(11) See *Kel.* 67 & 70.

(12) *New Edit.* p. 487.

(13) The reason of this seems to be, because it is as much shut as the nature of the thing will admit.

(14) Because in *fraudem legis*; for the same reason it is burglary, where the thieves gain entrance by pretenses of business with one in the house, *Kel.* 42, or of executing any process, or the like, *Kel.* 43, 44, 62, 82.

(15) *New Edit.* p. 487.

(16) *Kel.* 69.

(17) In old times this would have been adjudged petit treason, for antiently where the intent was so apparent *voluntas reputabatur pro facto*, *Coron.* 383.

(18) They all concurred, except *Winch*, who doubted.

(19) *Hutt.* 20. *Kel.* 67.

(20) *New Edit.* p. 487.

(21) But now this doubt is settled by 12 *Ann. Cap.* 7. whereby breaking to get out is put upon the same foot with breaking to get in. And see 7 & 8 *W. IV. c.* 29. s. 11.

(22) *Kel.* 83.

(23) *Kel.* 69. But it is a felony, for which the offender is ousted of his clergy, by 3 & 4 *W. & M. cap.* 9.

(24) *Kel. ubi supra.*

(25) It was adjudged by *Mountague* chief justice *C. B.* and *Saunders* only related it.

(26) Lord Coke says it is the mansion-house of Almighty God, but this is only a quaint turn without any argument, and seems invented to suit his definition of burglary, viz. the breaking into a *mansion-house*, whereas it appears from *Spelman loco supra citato*, and 22 *Assiz.* 95 that it is not necessary to burglary, that a *mansion-house* be broken, for the breaking of churches, the walls or the gates of the city is also burglary, and the word *mansionalis* is only applicable to one kind of burglary, viz. the breaking of a private-house, in which case it must be a *dwelling-house*.

(27) Even tho he had never lodged in it, but was removing his goods there in order to lodge in it. *Kel.* 46.

(28) *New Edit.* p. 488. See also *Poph.* 52 *Mo.* 660.

(29) *Cro. Car.* 473 by the name of *Evans* and *Finch*.

(30) Chief Justice *Keeling* was of a different opinion, and thought in such case the indictment ought to be laid for breaking *domum mansionalem* of *B.* for while there is but one entrance, it is but one dwelling-house, tho there be several inmates, but otherwise it is, if a man divides some rooms from the rest of the house, and make another door to those rooms, *Kel.* 83 &c.

(31) p. 522.

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(32) *Kel.* 84.

(33) *Mo.* 466.

(34) This was antiently understood only of the walls or gates of the city; *vide Spelman in verbo burglaria*; if so, it will not support our author's following conclusion, wherein he applies it to the wall of a private house.

(35) 2 *Co. Instit.* 433.

(36) *New Edit.* p. 489.

(37) 2 *Co. Inst.* 180.

(38) This defect is supplied by 3 & 4 *W. & M. cap.* 9.

(39) This statute does not exclude those who challenge peremptorily above twenty; this, according to our author's opinion, (*vide Postea, Lib. II. cap.* 48) was needless; but they are since excluded by 3 & 4 *W. & M. cap.* 9.

(40) But they are since ousted by 3 & 4 *W. & M. cap.* 9.

(41) Since our author wrote, there have been other statutes made to take away clergy in cases of larciny committed in dwelling-houses, &c.

By 3 & 4 *W. & M. cap.* 9. "Clergy is ousted from those who shall feloniously take away any goods in any dwelling-house, any person being therein and put in fear, or shall rob any dwelling-house in the day-time, any person being therein; or shall comfort, aid, counsel or command any person to commit any of the said offenses, or to break any dwelling-house, shop or warehouse thereto belonging, and therewith used in the day-time, and feloniously to take away any money or goods to the value of five shillings, altho no person be within such dwelling-house, &c. or shall counsel, hire or command any person to commit any burglary, if they be convicted, stand mute, or challenge peremptorily above twenty."

The design of this clause was to deprive the accessaries *before* of the benefit of their clergy; but this statute not mentioning booths nor out-houses leaves the accessaries in such cases to their clergy.

The same statute enacts, "That persons indicted for a crime, of which being convict they should not have their clergy by any former statute, shall not have it if they stand mute, or will not answer directly, or challenge peremptorily above twenty, or be outlawed.

"Persons indicted of felony for stealing of goods, &c. if convicted, stand mute, will not directly answer, or challenge peremptorily above twenty, shall lose their clergy, if it appears upon evidence or examination, that the goods were taken in another county in such a manner, whereof, if convicted by a jury of that county they should not have their clergy."

This part of the statute helps the several former acts, which were defective either as to the point of standing mute, or challenging peremptorily, or being outlawed.

By 10 & 11 *W. 3. cap.* 23. "All persons, who by night or by day shall in any shop, ware-house, coach-house or stable privately and feloniously steal any goods, wares or merchandizes of the value of five shillings, or more, tho such shop, &c. be not broke open, and tho the

owner, or any other person be not therein, or that shall assist, hire or command any person to commit such offense, being thereof convict or attained by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty, shall be excluded from the benefit of clergy."

The uses of this statute are these:

1. By the former statutes (except the case of a booth in a fair or market, by 5 & 6 E. 6.) it was necessary, in order to take away clergy, that the robbery should be in a dwelling-house, whereas this statute extends to shops, ware-houses, &c. tho they should not be adjoining to, or be any part of, a mansion-house.

2. The former statutes required that there should be an actual breaking or putting in fear, otherwise it would not be a robbery, which is the stealing intended by 39 Eliz. cap. 15, as appears from the preamble of that statute; but by this statute, if the goods stolen be of the value of five shillings, the offender is ousted of clergy as to a shop, ware-house, coach-house, or stable, tho there be no breaking or putting in fear.

3. By 23 H. 8. and 1 E. 6. clergy was not taken away, unless there were some person in the house put in fear, nor by 5 & 6 E. 6. unless some of the family were in the house or booth; nor by 39 Eliz. unless it were in the day-time, and no person in the house; so that if the offense were committed when any person was in the house, if not put in fear, nor one of the family, or when nobody was in the house, if it were in the night-time, in neither of these cases was clergy taken away by those statutes; but this statute takes it away in both those cases as to shops, &c.

But still this statute omitted to mention dwelling-houses or out-houses, wherefore, to supply this omission, another statute was made, *vis.*

12 Ann. cap. 7. by which it is enacted, "That if any person shall feloniously steal any money, goods, or chattles, &c. of the value of forty shillings in any dwelling-house or out-house thereto belonging, altho it be not broken, nor any person therein, or shall assist any person to commit such offense, and shall be convicted by verdict or confession, or stand mute, or will not answer directly, or shall challenge peremptorily above twenty, he shall be debarred from the benefit of clergy." See *ante*, note at p. 519.

But both these statutes seem defective as to persons outlawed.

(42) See *Grot. de jur. belli ac pacis*, Lib. II. cap. 2 §§ 6 & 7.

(43) *New Edit.* p. 489.

(44) What our author here observes is undoubtedly true, that the plea of necessity ought not in such cases to be allowed, and the reason is, because the law supposes, that no man can in a well governed commonwealth be driven to such a necessity; this supposition is the more reasonable in *England*, where there are so many laws, and such large sums yearly collected for the relief of the poor, as are more than sufficient for that purpose, if rightly applied; yet such is the neglect in the execution of those laws, that it were to be wished some expedient were found out to render that relief more speedy and effectual, lest,

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while the necessity be real, the relief be only supposititious, which our author himself thought was oftentimes the case, notwithstanding the provisions of the law; (*see his preface to his discourse touching the provision for the poor,*) which makes it reasonable it should be allowed as an argument for mercy, tho not as a plea in justification.

Several English Cases:—To shed additional light on the subject we incorporate in this review the following English cases:

REX v. WITHAL and OVEREND.

1 Leach's Crown Law, (3rd Ed.) 102.

On an indictment of burglary, the prisoner may be acquitted of the breaking, and found guilty of stealing in the dwelling-house to the amount of forty shillings.

Crown Case Reserved.

At the Assizes at *Guildford* for the County of *Surrey* 1772, the prisoners were tried upon an indictment for burglariously breaking and entering the dwelling-house of *Elizabeth Penifold* of *Croydon*, and stealing therein one box, containing sixty pounds of money, the property of the said *Elizabeth*. There was a second count, the same as the first, only laying it to be the property of thirty persons therein named, who held a Club at her house.

The evidence was very full against the prisoners, as to the stealing of the box and money in the dwelling-house of *Elizabeth Penifold*, to whose care it was intrusted by the members of the Club; but as to the breaking, the evidence was defective.

The verdict was entered upon the record: "Jury say, Not Guilty of breaking, but Guilty of stealing the box and money in the dwelling-house."

Upon this form of entering the verdict, it was objected by the prisoner's Counsel, that they were not excluded from the benefit of clergy, because the Jury had acquitted them of the burglary, and there was no separate and distinct count in the indictment on the 12 Ann. c. 7. for stealing in the dwelling-house to the value of forty shillings.

Upon this objection the case was reserved; but the Judges were unanimous, That the prisoners were by this finding ousted of their clergy, for that the indictment contained every charge that was necessary in an indictment upon that statute viz., stealing in a dwelling-house to the amount of forty shillings.

KING v. GARLAND.

1 Leach's Crown Law (3rd Ed.) 171.

An out-house separated from the mansion by an open passage eight feet wide and not connected to the mansion by any fence, is not within the curtilage.

Crown Case Reserved.

At the Gaol delivery holden at the Castle of *Taunton*, in and for the County of *Somerset* on the 13th of March 1776, before Mr. Baron Eyre and Mr. Baron Hotham, *William Garland* was indicted for burglariously breaking and entering the dwelling-house of *George Shaw* with intent to commit a felony.

The jury found the following verdict: "That the prisoner broke and entered, in the night-time, an out-house in the possession of *George Shaw*, and occupied by him with his said dwelling-house, and separated therefrom by an open passage eight feet wide, with intent to commit a felony: That the said out-house is not connected with the said dwelling-house by any fence enclosing both the said out-house and dwelling-house but whether" &c.

This case was referred to the consideration of the Judges: and they were unanimously of opinion, That from the manner in which the Jury had found the facts, it was impossible to consider this out-house as part of the dwelling-house; and therefore, as the burglary was the only offense charged in the indictment, the prisoner must be acquitted. (a).

(a) *Domus mansionalis* doth not only include the dwelling-house, but also the out-houses that are parcel thereof as barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, though they are not under the same roof, adjoining or contiguous to it, Co. P. C. 64, Dalton, 254, 1 Hale, 558. And it was agreed by all the Judges in the time of *L. C. J. Hyde*, that the breaking and entering, in the night-time, of *bake house*, eight or nine yards distant from the dwelling-house and only a pale reaching between them was burglary. *Castle's Case* 1 Hale 558, but if the out-house be far remote from the dwelling-house, so as not to be reasonably esteemed parcel thereof; as, if it stand a bow-shot off and not within or near the curtilage of the chief house; it is not *domus mansionalis* nor any part thereof. *Year Book* 2 Edw. 6 Bro. Cor. 180. 1 Hale 559, See also *Green's case*, *Old Bailey February Sess. 1789*, before Mr. Baron Thompson and Mr. Justice Grose.

REX V. RICHARD CLAYTON AND WILLIAM DUNNING.

Russell & Ryan 360.

Indictment for burglary. Prisoner broke into a goosehouse, opening into the prosecutor's yard, into which his house also opened; the yard was surrounded partly by other buildings of the home-stead, and partly by a wall; some of the buildings had doors opening backwards, and there was a gate in one side of the wall opening upon a road; this goosehouse was held part of the dwelling-house.

Crown Case Reserved—Easter Term 1818.

The prisoners were tried and convicted before Mr. Justice Bayley, at the Lent Assizes for the County of York, in the year 1818, of burglary.

The place into which the prisoners broke, was a goosehouse in the prosecutor's yard, and opposite his house. The yard had a barn all

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along the north side; a wall seven feet high on the south; a stable, goosehouse, and a weaver's shop, on the east; and the house, with a wall seven feet high on the west.

In the south wall, there was a gate leading into an adjoining lane, and the stable and weaver's shop had doors opening backwards, as doors opening into the yard.

The learned judge was not clear, whether this goosehouse could, under these circumstances, be deemed parcel of the dwelling-house; and therefore stated the case for the consideration of the judges.

In Easter term, 1818, the judges met, and held that this goosehouse was part of the dwelling; and that the conviction was right. (a)

(a) Vide 1 Hale, P. C. 558.

REX V. EDWARD WALTERS and Others.

1 Moody's Crown Cases 13.

BURGLARY: *An out-house in the yard of a dwelling-house, will be parcel of the dwelling-house if the yard is enclosed, though the occupier has another dwelling-house opening into the yard, and he lets such dwelling-house with certain easements in the yard.*

Crown Case Reserved—Easter Term 1824.

The prisoners were tried before Mr. Justice Holroyd at the Lent assizes, in the year 1824, and convicted of a burglary.

A question arose, whether the warehouse in which the robbery was committed was in law part of the prosecutor's dwelling-house, and which question was submitted to the consideration of the Judges.

The prosecutor, a grocer, had a dwelling-house in which he lived and carried on his trade. The back part opened into a yard, where the warehouse, which he also used for his trade, was situate, and into which yard the warehouse also opened.

The yard was entirely inclosed by his house and other buildings, and by a wall, and gates which were closed and fastened at night, and the whole were his property; and, except as after-mentioned, were in his possession.

His dwelling-house was in one range of building with the warehouse broken into; but between them, in the same range, was another dwelling-house, his property also, opening into the yard, and let to a person who occupied it, together with some easements in the yard, as his yearly tenant.

The two houses had formerly been both in one.

The prisoners received judgment as for a burglary, but the learned Judge reserved the point for the opinion of the Judges.

In Easter term, 1824, nine of the Judges met, and considered the case. They held the conviction right, being of opinion that the warehouse was part of the prosecutor's house; it was so before the division, and they thought it remained so after the division. (a)

(a) See *Brown's Case*, 2 East. P. C. 501, 502; but see also *ibid.* 493.

S. C. 2 Leach, C. C. 1018, *notis*, 4th ed.; S. P. *Rex v. Stock*, Russ. & Ry. C. C. R. 185.

REX V. DAVID JENKINS AND ANOTHER.

Russell & Ryan 244.

If a house is let to A and a warehouse under the same roof, and with an internal communication to the house, to A and B; the warehouse, in an indictment for burglary cannot be described as the dwelling-house of A.

Crown Case Reserved—Easter Term 1813.

The prisoners were tried and convicted before Mr. Justice Gibbs, at the Warwick Lent assizes, in the year 1813, upon an indictment for a burglary charged to have been committed in the dwelling-house of Josiah Richards, at Birmingham.

Mrs. Richards, it appeared, was the owner of a dwelling-house and warehouse, under the same roof, and communicating together within; there was also an external door to one of the warehouses.

The dwelling-house Mrs. Richards let to her son, Josiah Richards, the person mentioned in the indictment. The warehouse she let to her son Josiah and his younger brother at a separate rent. The two brothers carried on their joint business in the warehouse. The communication between the warehouse and the dwelling-house was constantly used by Josiah the elder brother. The younger brother had no interest in, or concern with, the dwelling-house.

The prisoners broke in the warehouse, and plundered it in the night.

The learned judge reserved this case in order to have the opinion of the judges, whether under these circumstances, the prisoners were properly convicted of breaking into the dwelling-house of Josiah Richards.

In Easter term, 15th of May, 1813, at a meeting of all the judges (except Lord Ellenborough and Mansfield, C. J., who were absent) it was unanimously agreed that the warehouse could not be considered as the dwelling-house of Josiah Richards, as laid in the present indictment, Josiah Richards holding the house in which he lived under a demise to himself alone, and the warehouse under a distinct demise to himself and his brother. The conviction was held wrong.

JOHN NUTBROWN'S CASE.

Foster's Crown Law 77—Newgate Sessions, 1750.

At the same sessions, John Nutbrown and Miles Nutbrown were indicted for burglary in the dwelling-house of one Mr. Fakney at Hackney, and stealing divers goods. It appeared by Mr. Fakney's evidence that he held this house for a term of years which is not yet expired, and made use of it as a country-house in the summer, his chief residence being in London; that, about the latter end of the last summer, he removed with his whole family to his house in the city, and brought away

a considerable part of his goods; that in *November* last his house was broke open and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen furniture, nor any thing else for the accommodation of his family. Mr. *Fakney* being asked whether at the time he so disfurnished his house he had any intention of returning to reside there declared, that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and let it for the remainder of his term.

The fact the prisoners were charged with was sufficiently proved; and was committed about midnight the first of *January* last.

The court was of opinion, that the prosecutor having left his house, and disfurnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not, under these circumstances, be deemed *his* dwelling-house at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary; which they did; but found them guilty of felony in stealing the clock and some other small matters; and they were ordered for transportation.

N. B.—Where the owner quitteth his house, *animo revertendi*, it may still be considered as his mansion-house, though no person be left in it; many citizens, and some lawyers, do so from a principle of good husbandry in the Summer or for a long vacation. See *Pop. 42, 52. 4 Co. 40.* and in *MSS. Denton and Chapple*, a case upon a burglary in the house of Mr. *Nichols*, *Easter* sessions 10 W. III. But there must be an intention of returning, otherwise it will not be burglary.

REX V. JAMES MARTIN AND JOHN TAYLOR.

Russell & Ryan. 108.

BURGLARY. *Inhabitaney of the house. Where the owner has never by himself, or by any of his family, slept in the house, it is not his dwelling house so as to make the breaking thereof burglary, though he has used it for his meals and all the purposes of his business.*

Crown Case Reserved—*Easter* Term 1806.

The prisoners were tried before Mr. Baron Graham, at the Lent assizes for the County of Northampton, in the year 1806, on an indictment for burglary committed on the 19th of December, 1805, in the dwelling-house of one Samule Clayson.

It appeared from the evidence, that the prisoners and others connected with them, had broken open the house in the night and stolen drapery and hosiery goods to the amount of considerably more than 200 *l.* But an objection was taken that the shop from whence the goods were taken, was not the dwelling-house of the prosecutor; and although the objection appeared to the learned judge to have weight, he thought it proper in a case attended with circumstances of considerable aggravation to overrule it. The case being left to the jury, they found the

prisoners guilty; and sentence of death was passed upon them; but the point was saved for consideration of the judges.

The house was to all intents and purposes a complete dwelling-house, if it could under the circumstances be considered as *inhabited*, upon which question the point arose.

The house stood on a street in Wellingborough, in the range of houses, the entry from the street being by a common door-way. The inside of the house consisted of a shop and parlor, from whence the goods were taken, and a stair case leading to a room over the shop in which there was bedding, but not fitted up. The prosecutor took it about two years before the offence was committed, and made several alterations in it, intending to have married and lived in it; but continuing unmarried, and his mother living in a house next door but one, he slept every night at her house. Every morning he went to his house, transacted his business in the shop and parlor, and dined and entertained his friends and passed the whole day there, considering it his only home. When he first bought the house he had a tenant, who quitted it soon afterwards, and since that time no person had slept in it.

The question reserved for the opinion of the judges was, whether this sort of inhabiting was sufficient to make the house the prosecutor's dwelling-house.

In Easter term 28th April, 1806, at a meeting of all the judges (except Lord Ellenborough) the conviction was held wrong, the house not being a dwelling-house.

· REX v. WILLIAM WILSON.

Russell & Ryan 115.

BURGLARY. *When a servant has part of a house for his own occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house; and it will be the same if any other person has part of the house and the rest is reserved.*

Crown Case Reserved—Trinity Term 1806.

The prisoner was tried before Mr. Baron Graham, at the Warwick Lent assizes, in the year 1806, on an indictment for *burglary, in a dwelling-house* of George Hinchcliff, at Birmingham.

The prisoner was convicted: but the case was reserved for the opinion of the twelve judges, upon the question whether the place broken into could be considered as the dwelling-house of George Hinchcliff.

George Hinchcliff was the governor of the work-house at Birmingham, appointed by the guardians and overseers of the poor of one of the parishes, in whom certain funds are vested by act of parliament for the benefit of the poor. The work-house consists of a large building in a court yard, surrounded by a wall; the entrance to the court is by the porter's gate; the building is divided into two wings or departments, the one being occupied by the poor people, the other by the governor and his

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family; and the part which the governor occupies is entirely detached from that which is occupied by the poor; except that their victuals are dressed in the same kitchen which he uses for his family; and he has a separate door to that part of the building which he occupies. The whole of the building, which is called the governor's house, consists of two parlors and a sitting room below, three bed-chambers and three large store-rooms above, and four attics. One of the parlors below which is betwixt the other two rooms on the same floor is appropriated to the business of the trust and is called the office or clerk's room, of which, the clerk keeps one key, the governor keeping the other, to secure the effects in case of fire, and his servant cleans and takes care of this room; and those on each side are entirely in his occupation.

The prisoner, probably with others, had gotten over the outward wall, thrown up the sash of this parlor or office window, and with a center bit had cut two round holes in the window shutter, through which, by putting in his hand and arm, he had unhasped and let down the cross-bar on the inside; then entering the room, he had broken open the chest in which the trust property was kept, and stolen notes and money to the amount of between two and three hundred pounds.

The governor held his appointment under a contract with the guardians and overseers of the poor for seven years and was paid by a salary, and by the occupation of the house by himself and family during that term: the guardians and overseers reserving to themselves the use of this room as an office, and the use of the three store-rooms as a deposit for the clothes and other effects of the poor of the work-house. The governor is assessed for this house, with the exception of the office, store-rooms and kitchen.

At a meeting of all the judges, on the first day of trinity term, 1806, the majority of them (Mansfield, C. J. and Heath and Grose, Js., seeming to dissent) were of opinion that this was not the dwelling-house of the governor; and therefore that the prisoner was improperly convicted of the burglary but was subject to be convicted of the larceny. The prisoner was therefore to be recommended to the crown for a pardon, on condition of being transported for seven years.

THE CASE OF GEORGE GIBBONS.

Foster's Crown Law 107.

Tried at Old Bailey June, 1752.

At the Old Bailey in June 1752, present Lord Chief Baron Mr. Justice *Foster*, Mr. Justice *Birch*, George Gibbons was indicted for burglary in the dwelling-house of *John Allen*. It appeared in evidence, that the prisoner in the night-time cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling-house; and putting his hand through the hole took out watches and other things which hung in the shop within his reach: but no entry was proved otherwise than by putting his hand through the hole. This was holden to be burglary, and the prisoner was convicted.

N. B. This hath been always so holden. The law requireth an entry, to complete the crime of burglary; but if any part of the body be within the house, hand or foot, this at common law is sufficient. And I conceive that such a kind of entry will be sufficient to bring the case within the statute of *Ed. VI.* and *Eliz.* with regard to house-breaking attended with larceny in the day-time.

I am likewise of opinion, that, with regard to the single point of breaking the house whatever kind of breaking will make a man guilty of burglary at common law, will bring him within those statutes; and that no act of violence short of a common law burglary will.

At a meeting the judges upon a special verdict in *January 1690* they were divided upon the question, whether breaking open the door of a cupboard let into the wall of the house was burglary or not. *Hale* saith, that such breaking is not burglary at common law, but thinketh it would be sufficient to bring the case within the statutes I have just cited. This distinction he groundeth on *Simpson's* case, and even saith that in that case the breaking open a chest in the house brought the case within the 39th of *Eliz.* which, I speak it with great deference, if a movable chest be meant cannot be law.

Simpson's case, as truly stated by *Hale* in one part of his work and by *Kelyng*, doth not in my opinion warrant any such distinction. It did not, nor possibly could, turn on the circumstance of breaking a chest or fixed cupboard or anything like it: nor doth it appear from the state of the case, that there was the least occasion to resort to any such constructive breaking; for in fact both outer and inner doors were broke open.

The case, in my opinion, turned singly on this point. The man had broke open the chest and brought the goods into the hall in order to carry them off, but was apprehended in the house. It was made a question whether this amounted to a stealing in the house within the 39th of *Eliz.* and it was holden that it did: the man had once possessed himself of the goods *animo furandi*. This in common law amounted to a caption and asportation, otherwise few persons who are taken in the fact could be convicted of larceny; and this being so, the construction of the statute must be accommodated to the rules of common law in like cases.

With regard to cupboards, presses, lockers and other fixtures of the like kind I think we must in favor of life, distinguished between cases relative to mere property and such wherein life is concerned. In questions between the heir or devisee and the executor, those fixtures may with propriety enough to be considered as annexed to, and parts of the freehold. The law will presume that it was the intention of the owner under whose bounty the executor claimeth, that they should be so considered to the end that the house might remain to those, who, by operation of law or by his bequest, should become intitled to it, in the same plight he put it or should leave it, entire and undefaced. But in capital cases, I am of opinion, that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils and adapted to the same use.

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REX v. WILLIAM ROBINSON AND THOMAS BACCON.

1 Moody's Crown Cases 327.

Removing the fastening of a window by the hand introduced through a broken pane of the window, and thereby opening the window and entering, is a breaking. Especially if the removal could not have been effected without breaking more of the glass.

Crown Case Reserved—Hilary Term 1832.

The prisoners were tried before Mr. Justice Alderson, at the Winter Assizes, for the county of Sussex, in the year 1831, for breaking and entering the dwelling-house of Charles Pullen, in the parish of Petworth, Sussex, and stealing therein a silver watch his property.

They were convicted on very clear evidence of the whole charge, and judgment of death recorded against them; but a doubt having arisen in the learned Judge's mind whether, according to the law laid down in *Rex v. Smith*, supra, 178, there was a sufficient breaking, the learned Judge thought it safest, after consulting Patteson, J. on the subject, to state the case for the opinion of the Judges.

It appeared that the entry had been effected in the following manner: a square of glass in the kitchen window (through which the prisoners entered) had been previously broken by accident, and a half of it was out at the time when the prosecutor left his house and property safe on the day of the offence committed.

The aperture formed by the half square which was out was sufficient to admit a hand, but not sufficient to enable a person to put his arm in so as to undo the fastening of the casement. One of the prisoners thrust his arm through this aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement: the window having been thus opened, the two prisoners entered the house, and stole the watch.

The doubt which the learned Judges entertained, arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing, (it not being like a chimney, an aperture necessarily left in the original construction of the house,) from the enlarging an aperture by lifting up further the sash of the window in *Smith's case*.

But the learned Judges also thought it was worth considering, whether, in both cases, the facts did not constitute, in point of law, a sufficient breaking.

In Hilary Term, 1832, all the Judges, (except Lord Lyndhurst, C. B., Garrow, B., and Bolland, B.,) met and considered this case, and were unanimously of opinion that this was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window; and they held that the conviction was good.

REX V. HENRY SMITH.

1 Moody's Crown Cases 178.

If the sash of a window be partly open, but not sufficiently so to admit a person, the raising it so as to admit a person is not a breaking of the house.

Crown Case Reserved—Hilary Term 1828.

The prisoner was tried before Mr. Justice Holroyd, at the December sessions at the Old Bailey, in the year 1827, for a capital felony, in breaking and entering a dwelling-house, and committing larceny therein.

He was convicted of the full offence, on the authority of a similar case that had recently occurred at the Old Bailey, a note of which was furnished by Mr. Baron Hulloek: in which case similar circumstances had been held to amount to a felonious breaking of the house.

From doubts, however, that were understood to have been afterwards expressed upon the point, the learned Judge respited the judgment, in order to take the opinion of the Judges upon the propriety of the conviction, as to the capital part of the offence.

The housebreaking (if there was one by the prisoner) was by pushing up or raising the lower sash of the parlor window which was proved to have been at about eight or nine o'clock in the morning, in a close state and shut quite down, but to have been also seen about twelve o'clock at noon of the same day in an open state or raised about a couple of inches, with the prisoner very near it; but yet only so open and raised as that there was not room enough for a person to enter the house through that opening, and commit the larceny. On the evidence it was clear, that the prisoner immediately afterwards threw the sash quite up and then having thus removed the obstruction to his entrance, entered through the enlarged aperture thus made, and committed the felony; but the jury declared their opinion to be, that the prisoner did not open the window all the way, but only raised the sash the second time.

The question for the opinion of the Judges was, whether the prisoner was properly convicted of the house-breaking, or whether he should have been convicted of larceny only?

In Hilary term, 1828, the Judges met, and all thought there was no decision under which this could be held to be a breaking, and that they ought not to go beyond what had been decided, unless the case was within some settled principle, which this was not; and that the conviction for house-breaking was, therefore, wrong.

REX V. JOHN RUST AND THOS. FORD.

1 Moody's Crown Cases 183.

Throwing up a window, and introducing an instrument between such a window, and an inside shutter to force open the shutter, if the hand or some part of it is not within the window, is not a sufficient entry to constitute burglary.

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Crown Case Reserved—Easter Term 1828.

The prisoners were tried and convicted before Mr. Justice Park at the April Old Bailey Sessions, 1828, (present Mr. Baron Garrow), for burglariously breaking and entering the dwelling-house of John Roper with intent to steal.

Of the breaking there was no doubt, and the learned Judge left the intent to the jury, telling them if they thought the intent was to steal, to find the prisoners guilty, and that he would take the opinion of the Judges upon the question of entering; the counsel for the prisoners having contended there was no sufficient proof of an entry. The jury having found the prisoners guilty, the learned Judge respited the judgment.

The facts were these as to the entering; the glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the shutters themselves were about an inch thick.

It appeared that, after the sash was thrown up, a crowbar had been introduced to force the shutters, and had not been only within the sash, but had reached to the inside of the shutters, as the mark of it was found on the inside of the shutters.

The inclination of the learned Judge's opinion at the trial as well as that of Mr. Baron Garrow, was that this was no burglary, as it did not nor could it appear whether any part of the hand was within the window, although the aperture was large enough to admit the hand.

This seemed to the learned Judge to be the general result to be collected from the cases alluded to in 2 Russ. 912, and 2 East, P. C. 490.

But as the case approached so near to that of the *King v. Bailey and Spencer*, Russ. & Ry. 341, and of the *King v. Davis*, Russ & Ry. 499, the learned Judge thought it right with the concurrence of Mr. Baron Garrow to save the point for the opinion of the learned Judges.

In Easter Term, 1828, at the same meeting as the last case; the learned Judges determined that this conviction was wrong, there being no proof that any part of the prisoner's hand was within the window.

REX v. WILLIAM BAILEY AND ANOTHER.

Russell & Ryan 341.

BURGLARY. *Introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary.*

Crown Case Reserved—Hilary Term 1818.

The prisoners were tried and convicted before Mr. Justice Park, in the year 1817, on an indictment for burglary.

It appeared in evidence, that a sash window belonging to the dwelling-house, was fastened in the usual way by a latch, from the bottom of the upper sash to the top of the lower one; and that there were inside

shutters, which were fastened. One of the prisoners broke a pane of glass in the upper sash of this window, and introduced his hand within, with the intention to undo the latch by which the window was fastened. While he was cutting a whole in the shutter with a centre-bit, and before he had undone the latch of the window, he was seized.

The point reserved for the consideration of the judges was, whether the introduction of the hand, between the window and the shutter to undo the window latch, was a sufficient entry.

In Hilary term, 1818, this case was taken into consideration by nine of the judges, (Gibbs C. J., Bayley and Dallas Js., being absent), when they were, of opinion, that there was a sufficient entry to constitute a burglary, and that the conviction was right. (a)

(a) Vide Gibbon's case, 2 East, P. C. Fost. 107, 108. 1 Hale, 553, 555. 1 Anderson, 114, 115. 1 Hawk. c. 17. s. 11. Rex. vs. Brice, East. T. 1821, *post*. Rex. vs. Davis, Hil. T. 1823, *Post*. Hughes's case, 1 Leach, C. C. 406, S. C. 2 East, P. C. 491.

REX v. JOHN DAVIS.

Russell & Ryan 499.

BURGLARY. *Where, in breaking a window in order to steal property in the house, the prisoner's finger went within the house. Held, that there was a sufficient entry to constitute burglary.*

Crown Case Reserved—Hilary term, 1823.

The prisoner was tried at the Old Bailey sessions, in January 1823, before the Chief Baron Richards, for burglary in the dwelling-house of Montague Levyson.

The prosecutor, Levyson, who dealt in watches and some jewelry, stated, that on the 2d of January, about six o'clock in the evening, as he was standing in Pall Mall opposite his shop, he watched the prisoner, a little boy, standing by the window of the shop which was part of the prosecutor's dwelling-house, and presently observed the prisoner push his finger against a pane of glass in the corner of the window. The glass fell inside by the force of his finger. The prosecutor added, that standing as he did in the street, he saw the forepart of the prisoner's finger on the shop side of the glass, and he instantly apprehended him.

The jury convicted the prisoner; but the learned judge having some doubt whether this was an entry sufficient to make the offence a burglary, submitted the case of the consideration of the judges.

In Hilary term, 1823, the case was taken into consideration by the judges; who held, that there was a sufficient entry to constitute burglary. (a)

(a) Vide *Rex. v. Bailey*, *ante*, p. 341, and the cases in the note, *ante*, 342.

(Sub-note:—Although this case illustrates a principle, it should not be accepted as a precedent, as to the amount of evidence necessary to convict. Certainly the evidence must have been stronger than given

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above; for, it would be unreasonable to convict *a little boy* of burglary, because while standing in front of the window of a jewelery shop, he pushed his *finger* against a pane of glass, causing it to fall, unbroken, to the inside of the window. He may have been attracted, as small boys usually are, simply as a matter of curiosity, and the pane of glass may have been a loose one, easily yielding to the touch.—J. F. G.)

REX v. WILLIAM BRICE.

Russell v. Ryan 450.

BURGLARY. *Getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house.*

Crown Case Reserved—Easter Term 1821.

The prisoner was tried before Mr. Justice Burrough at the Lent assizes for the county of Dorset in the year 1821, for burglariously breaking and entering the dwelling-house of George Smith in the night of the 2d of December 1820, with intent feloniously to steal the goods and chattels of the said George Smith therein being.

It appeared, by the evidence of the wife of the prosecutor, that whilst sitting in a room adjoining the shop (part of the dwelling-house of her husband,) in which were various goods, the stock of her husband's trade, she heard, about twelve at night, a noise in the shop; that she took a candle and went into the shop, and perceiving some soot fall from the chimney, she looked up and saw a man lying across the chimney, just above the mantle piece.

It appeared that the man had not otherwise been in the shop, and the chimney had no communication with any other room in the house.

An alarm was made, and a man who proved to be the prisoner was immediately seen to come out at the top of the chimney. He was pursued and immediately apprehended.

The prisoner was by trade a chimney sweeper, and had shortly before been employed by the prosecutor to sweep the chimney of the shop, and also that of the sitting room, being all the chimneys in the house.

The learned judge, not being satisfied that the evidence was sufficient to support the charge of *breaking and entering into the dwelling-house*, he desired the jury to consider, whether they were satisfied that the prisoner's intention was to steal goods in the shop: and if they thought so, he advised them to find him guilty; and he informed them, that he should reserve the other point for the opinion of the judges.

The jury found the prisoner guilty.

In Easter term, 1821, the judges met, and considered this case. Ten of the judges, viz. Best J., Garrow B., Park J., Bayley J., Wood B., Graham B., Richards C. B.

Dallas C. J., Abbott L. C. J., held the conviction right. They were of opinion that the chimney was part of the dwelling-house; that the getting in at the top was a breaking of the dwelling-house; and that

the prisoner by lowering himself in the chimney made an entry into the dwelling-house. Holroyd J., and Burrough J., thought the prisoner could not be said to have broken and entered the dwelling until he was below the chimney piece. (a)

(a) Vide 1 Hawk. P. C. c. 17. s. 5. 1 Hale, 552. 2 East, P. C. 485. 2 Russ. 902. *Rex v. Bailey*, *supra*, 341, and the cases there cited in *notis*.

REX v. WILLIAM HAINES AND WILLIAM HARRISON.

Russell & Ryan 451.

BURGLARY. *Pulling down the sash of a window is a breaking, though it has no fastening, and is only kept in its place by the pulley weight; it is equally a breaking, although there is an outer shutter which is not put to.*

Crown Case Reserved—Easter Term 1821.

The prisoners were tried and convicted before Mr. Justice Richardson, at the Old Bailey sessions, February, 1821, for burglariously breaking and entering the dwelling-house of Richard Plunkett, with intent to steal the goods and chattels in the same dwelling-house then being.

The evidence was satisfactory as to the fact; but a doubt arose whether the *breaking* was sufficient in point of law to constitute burglary.

The prisoners were found in the front parlor of the prosecutor's house, about a quarter-past five o'clock in the evening of the 16th of January, 1821. It was then quite dark. It appeared that they had entered through the upper part of the window, which the prosecutor had closed a short time before, and which the prisoners had opened by pushing down the upper sash.

There was a fastening to the lower sash, but none to the upper sash, which, during the day-time, was usually kept closed by the pulley weight only.

There was an outside shutter to this window, which was usually closed and fastened about dark by the sons of the prosecutor, on their return from school; but on the evening in question, the closing the outer shutter was delayed, in consequence of the children returning later than usual from school.

The question was, whether the pushing down of the upper sash by the prisoners in the manner stated, amounted to a sufficient breaking.

In Easter Term, 1821, the judges met and considered this case. They were unanimously of opinion, that the pulling down of the sash was a sufficient breaking, and the prisoner was rightly convicted. (a)

(a) 1 Hale, 552, *Brown's Case*, East P. C. 487. S. C. 2 Russ. 902. *Rex v. Callan*, *ante*, 137, *Rex v. Hall*, *ante*, 355.

STATE v. PETIT.

32 Wash. 129—72 Pac. Rep. 1021.

Decided June 27, 1903.

BURGLARY: *Flat car covered with canvas, not the subject of.*

1. A flat car loaded with bags of wheat, the car and bags of wheat being completely covered with a tarpaulin made of heavy canvas entirely inclosing the said wheat and made secure at the sides and ends of the car so as to form sides, roof, and ends for the car, is not "railroad car" in contemplation of the statute of the State of Washington defining burglary.
2. While it was the intention of the Legislature to somewhat enlarge the definition of burglary, the central idea which has obtained for hundreds of years, that the unlawful entry must be in some kind of a closed structure, has been retained.

Appeal from Superior Court, Kittitas County; Hon. Frank H. Rudkin, Judge.

J. C. Petit indicted for burglary. Demurrer sustained. The State appeals. Affirmed.

Clyde V. Warner, Prosecuting Attorney; *C. B. Graves* and *Austin Mires*, (of counsel) for the State.

Pruyn & Slemmons, for respondent.

DUNBAR, J. The defendant was charged with burglary upon the following information:

"The said J. C. Petit, on the 19th day of October, A. D. 1902, in the County of Kittitas, State of Washington, did then and there unlawfully break and enter in the night-time a railroad car to wit, a flat car used for carrying freight and merchandise, belonging to the Northern Pacific Railway Company, said flat car being then and there loaded with wheat in bags or sacks, and said car and wheat upon it being entirely covered with a tarpaulin made of heavy canvas, and which tarpaulin entirely inclosed said wheat, and was securely fastened to said car at the sides and ends thereof so as to form a roof and sides and ends for the upper portion of said car, with the intent then and there to commit a misdemeanor therein."

A demurrer was interposed to the information on the ground that the facts charged did not constitute a crime. The court

sustained the demurrer to the information, and the cause was brought to this court for review.

The question is, is the car or the structure on wheels described in the information a railroad car, such as was within legislative contemplation in section 7104, 2 Bal. Code, where burglary is defined as follows: "Every person who shall unlawfully enter in the night-time, or shall unlawfully break and enter in the day time any dwelling house or outhouse thereunto adjoining and occupied therewith, or any office, shop, store, warehouse, malt house, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, water craft or any building in which any goods, merchandise or valuable things are kept for use, sale or deposit within the body of any county with intent to commit a misdemeanor or felony, shall be deemed guilty of burglary," and the penalty is imprisonment in the penitentiary for any period not more than fourteen years. It is conceded that the car described in the information is the ordinary flat car which is used by railroad companies for the transportation of wheat. These cars are matters of common observation to people who have occasion to observe the freighting interests of the country by rail, the tarpaulin or cover being evidently not for the purpose of forming part of an inclosed structure, but principally to protect the grain from the inclemency of the weather, and possibly to assist in a measure in keeping the sacks on the car from shifting their places. These cars, it seems to us do not come within the definition given by the statute, which evidently had relation to box cars, or some kind of a car that is inclosed so that an entry can be made. Under the ordinary understanding of the words "break and enter" it is difficult to see how a person could break and enter a flat car loaded with wheat upon which a canvas is laid. The authorities cited by the appellant, it does not seem to us, are at all in point.

It is the contention of the appellant that the statutes of various states of the Union enlarge or modify the common law definition of burglary until by codific evolution the species has been entirely lost, and that we have positive enactments which say certain acts are burglary, the word "burglary" being employed simply to give it a heinous character. The common-law definition of burglary is breaking and entering the dwelling house of another in the night-time with intent to commit a felony. It is not true,

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we think, that by codific evolution the species has been entirely lost. While there has been an enlargement of the definition, the central idea which has obtained for hundreds of years, viz., the unlawful breaking and entering of some kind of an inclosed structure, has been retained, the statute finally dropping the element of breaking when the structure was unlawfully entered in the night-time; and we do not think that it was the legislative intent to confuse the crimes of burglary and larceny, or substitute one definition for the other. It is no doubt true that the Legislature has the power to denominate any kind of larceny, or, for that matter, any other crime, burglary; but in legislation on crimes the definitions of which have been so well and commonly understood as the crimes of burglary and larceny, the substitution will not be presumed unless the intention is manifest—as it is not in this case.

The demurrer was properly sustained, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ.,
concur.

STATE v. POOLE.

65 Kan. 713—70 Pac. Rep. 637.

Decided November 8, 1902.

BURGLARY OF CHICKEN COOP—CONSTRUCTION OF STATUTE: *The words; "shop, store, booth, tent, warehouse or other building" held, to the breaking into an occupied chicken coop—Instruction defective, in that it did not limit the case to the breaking into an occupied chicken coop.*

1. A frame chicken house, having doors and a board roof, is comprehended by the words "other building," used in the second subdivision of section 2059, Gen. St. 1901. *State v. Rogers*, 39 Pac. 219, 54 Kan. 683, followed.
2. To constitute burglary in the second degree, under section 2059, Gen. St. 1901, the building broken into and entered must at the time contain some human being, or have goods, wares, merchandise, or other valuable thing, kept or deposited therein. It is the duty of the court to instruct the jury that these essential elements of the crime must be found before the accused can be convicted.
(Syllabus by the court.)

In banc. Appeal from District Court, Shawnee County; Hon.
Z. T. Hazen, Judge.

A. F. Poole, convicted of burglary, appeals. Reversed.

C. A. Magaw and *R. F. Hayden*, for the appellant.

A. A. Godard, Attorney General, *J. S. West*, Assistant Attorney General, and *Galen Nichols*, County Attorney, for the State.

SMITH. The appellant, A. F. Poole, was informed against in the District Court, charged with burglary and larceny. It was alleged that he burglariously broke into and entered a certain building, commonly called a "henhouse" or "chicken coop," belonging to one N. T. Caldwell, in which building merchandise and valuable personal property were then and there kept and deposited, with the felonious intent to steal and carry the same away. It was further charged that, being in said building, the appellant did take, steal and carry away four hens, of the value of 50 cents each. He was convicted of burglary in the second degree and larceny, and sentenced to the penitentiary at hard labor for a period of seven years.

It is contended by counsel for appellant that the building into which he was charged to have broken and entered, not having been alleged to be within the curtilage of a dwelling house, is not covered by the use of the words "or other building," in the second subdivision of section 2059, Gen. St. 1901. That section reads:

"Every person who shall be convicted of breaking and entering in the night-time—First, any building within the curtilage of a dwelling house, but not forming a part thereof; or, second, any shop, store, booth, tent, warehouse or other building, or any boat or vessel, in which there shall be at the time some human being, or any goods, wares or merchandise, or other valuable thing, kept or deposited, with intent to steal or commit any felony therein, shall on conviction be adjudged guilty of burglary in the second degree."

The argument is that the words "other building" refer to buildings of the same general character to those particularly mentioned, and that a chicken house is not comprehended within the words "shop, store, booth, tent or warehouse," for the reason that it does not partake of the character of such buildings, and that, under a well-settled rule of construction, where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and

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the general words are to be treated as referring to matters *ejusdem generis* with such class.

We were much impressed on the argument by the reasoning of counsel for appellant in support of this contention. We find however, that the question has been decided against the position taken by them in the case of *State v. Rogers*, 54 Kan. 683, 39 Pac. 219, where this same section of the statute was before the court for construction. It was there held that a courthouse was included within the words "or other building," in the second subdivision of the statute above set out. In the case mentioned, the doctrine contended for by counsel was given much consideration. The court said:

"We think the legislature intended to include buildings of other classes than those specifically mentioned. We are very clear that banks, offices, and buildings used for many other purposes are within the protection of the statute, if valuable things are kept in them."

In the present case the chicken house alleged to have been burglarized was 20 feet long and 8 feet wide, with doors and a board roof. The court gave to the jury an instruction setting forth the elements of burglary in the second degree, as it is defined by statute. Following this, the court gave the jury this instruction: "If you believe from the evidence in this case that the building described in the information was an enclosed building, about twenty feet long and about eight feet wide, with a partition therein, and that the building was constructed with doors to be used in entering the building, and was built and used by the complaining witness as a building within which to keep his chickens, then I instruct you that would constitute a building as contemplated by our statute."

Section 2059, Gen. St. 1901, above set out, makes it a necessary ingredient of the crime of burglary that the breaking and entering should be in a building in which there shall be at the time some human being, or goods, wares, or merchandise, or other valuable thing, kept or deposited. The instruction given, informed the jury that it was sufficient if the evidence against the appellant showed that the building was built and used by the complaining witness as a building "within which to keep his chickens."

All of this might have been true, and yet, at the time of the

breaking and entering, the building might have been without contents, and entirely empty. The breaking and entering a building, though it be generally used as a chicken house, and built for that purpose, would not constitute burglary, unless at the particular time it contained goods, wares, or merchandise, or other valuable thing. The prejudicial omissions from this direction to the jury were not supplied by any other instructions.

The judgment of the court below will be reversed, and a new trial ordered. All the justices concurring.

Note (By J. F. G.).—The court concedes the familiar rule of statutory construction,—that the enumeration of persons or things followed by a general clause, limits the operation of the statute, to persons or things of the same class or nature as those specifically enumerated; yet it substantially holds, that the clause,—“or other building,” in the burglary statute of Kansas, is not limited by the enumerations preceding it. This, to us, seems to be very illogical.

As appears in our introductory review of the law relating to burglary, the doctrine, that burglary was limited in general to felonious breaking into dwelling-houses, or buildings within their immediate inclosure, in the night-time, was seasoned by the judicial wisdom and experience of centuries. This being so, and the doctrine being a very wholesome one, it is not to be presumed that the legislature intended by implication to abandon it, and throw around the habitations of setting hens, the same security that the common law gave to the habitations of human beings.

Had the legislature intended to cover all buildings, it could have so declared; but it evidently intended to cover only certain kinds of buildings and enumerated some of them, adding the general clause, “or other building,” so as to include those of the same nature or class. A *chicken coop* is not of the same class as a *shop, store, booth, tent or ware-house*, and hence, is not within the limit of the statute. However the Supreme Court of Kansas does not stand alone, for in Illinois we also find a *hen-coop-decision* (*Gillock v. People* 171 Ill. 307; 49 N. E. Rep. 712.)

A very interesting case upon this subject, holding that a chicken coop does not come within the terms of a statute declaring it to be burglary to feloniously break and enter “any shop, store, booth, tent, warehouse or other building,” is that of *Schuchmann v. State*, 133 Mo. 111; 33 S. W. Rep. 35; 34 S. W. Rep. 842. The case was first decided December 3, 1895, by Division 2 of the Supreme Court of Missouri, composed of three judges, one judge dissenting. On March 9, 1896, the decision was approved by the court *in banc*, three out of seven judges dissenting. Despite the dissenting opinions, this may be considered as an authority; for so thoroughly was the majority of the court convinced as to the soundness of the contention that the case of *Hecox v. State*, holding that a *granery* came within the statute was overruled.

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In *Regina v. Reed*, 28 E. L. & E. 123 it was held that a statute referring to "any wherry, lighter or other craft" did not operate against a steam-tug, because, a wherry was for carrying passengers, a lighter for carrying goods, while a steam-tug was not for either purpose, and therefore was not *an other craft* within the meaning of the statute.

In *Shirk v. People*, 121 Ill. 61; 11 N. E. Rep. 888, it was held that a statute declaring it to be unlawful to make or pass any fictitious bill, note, check or other instrument in writing for the payment of money, was limited in its operation to negotiable instruments.

STATE V. BUGG.

66 Kan. 668—72 Pac. Rep. 236.

Decided April 11, 1903.

BURGLARY—PRACTICE: *Construction of the Word, "Curtilage," Under a Kansas Statute—Amendment of the Information.*

1. An information may be amended in matter of form at the trial, and when so amended it need not be reverified, nor is the defendant entitled to a rearraignment.
2. A building may be within the curtilage of a dwelling, and not form a part thereof, although neither is enclosed.
(Syllabus by the court.)

Appeal from District Court, Crawford County; Hon. W. L. Simons, Judge.

Benjamin Bugg, convicted of burglary and larceny, appeals. Affirmed.

Arthur Fuller and *B. S. Gaitskill*, for the appellant.

A. A. Godard, Attorney General, *J. J. Campbell*, *J. M. Wayde*, and *D. H. Woolley*, for the State.

GREENE, J. This is an appeal from a conviction of burglary and larceny. The information charged the appellant with burglary in the night-time of a one-story building situated within the curtilage of a dwelling house, but not "gorming" a part thereof, in which were at the time goods, wares, and merchandise. At the trial the appellant objected to the admission of evidence under the information for the reason that it did not charge a burglarious breaking into and entering of the dwelling house, or any building within the curtilage of the dwelling house, and not forming a part thereof. This objection was upon

the ground that in that part of the information describing the building alleged to have been burglarized a mistake was made in spelling the word "forming." As will be observed, it was spelled "gorming." When this was called to the attention of the court, the county attorney, with the consent of the court, corrected the mistake, and reverified the information. The objection to the introduction of evidence was overruled, and this is one of the alleged grounds of error.

The mistake in spelling the word and in correcting it were mere matters of form, and not of substance. The correction was not prejudicial to the rights of appellant. Such amendments may be made after the trial has commenced, at the discretion of the court. Section 72 of the Criminal Code (Gen. Stat. 1901, Sec. 5513), reads:

"An information may be amended in matter of substance or form at any time before the defendant pleads, without leave. The information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant. No amendment shall cause any delay of the trial, unless for good cause shown by affidavit."

See *State v. Pryor*, 53 Kan. 657, 37 Pac. 169; *State v. Spencer*, 43 Kan. 114, 23 Pac. 159; *State v. Cooper*, 31 Kan. 505, 3 Pac. 429; *State v. McDonald*, 57 Kan. 538, 46 Pac. 966.

Complaint is made that after the information was amended the defendant was not again arraigned. This was unnecessary. Where an information is amended at the trial in form only, a rearrangement is not required.

There is no evidence tending to show that the building alleged to have been burglarized was within the same inclosure with the dwelling. In defining the term "within the curtilage of a dwelling," the court said: "That is, such frame building must have been then and there situated and standing near to and in the same yard with said dwelling house, and used in connection with said dwelling house, but not forming a part of said dwelling house."

It is contended by the appellant that inasmuch as the court instructed the jury that it must find that the building burglarized was "in the same yard with the dwelling house," and as there was no evidence to show that it was within the same in-

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closure, therefore it was not within the same yard. Webster's definition of the word "yard" is: "An inclosure; usually a small inclosed place in front of or around a house or barn." The word "yard," as generally used, when speaking of a dwelling, does not necessarily mean or suggest the idea to the American mind of an inclosure, but, rather, the plat immediately surrounding and upon which is situated the dwelling and other buildings used in connection therewith for domestic purposes. This ordinarily is the accepted meaning of the word when thus used, and it must have been so understood and used by the court in giving this instruction. A building may be within the curtilage of a dwelling, and neither of them be inclosed. The idea that a building, to be within the curtilage of a dwelling, must be inclosed with the dwelling, was borrowed from England, where, for the better protection of property, the curtilage was inclosed with a stone fence or wall. This custom never obtained in this country. We have never thought it necessary to adopt such precautionary measures. Therefore the doctrine that a building not inclosed with the dwelling is not within the curtilage has no application here. If it is so inclosed and used in connection therewith, it would undoubtedly be within the curtilage; but it is nevertheless within the curtilage if situated within such close proximity to the dwelling as to be conveniently accessible, and is actually used in connection with the dwelling for domestic purposes, although neither are inclosed. The custom not to inclose a dwelling has become so nearly universal, especially in the cities in this country, that when we see one inclosed it is especially noticeable. It is said in *Fortnightly Review* (N. S.) XLIII, 679: "Most of the houses [at Concord, Mass.], especially the newer ones, stand in their own well-kept grounds or yards, facing the road, with no fence or hedge to separate them from the highway."

This statement is especially applicable to the dwellings in towns and cities in Kansas. We think the Legislature used the word "curtilage" in that enlarged sense applicable to the customs of this country; intending that it should include all buildings in close proximity to the dwelling, which are continually used for the carrying on of domestic employment, although neither the dwelling nor the building is inclosed.

It follows, therefore, that the judgment of the court below must be affirmed.

All the Justices concurring.

Note—Rather an extreme construction of the word, "Curtilage." See, Lord Hale's review of burglary.

HAHN V. STATE.

60 Neb. 487—82 N. W. Rep. 674.

Decided September 19, 1900.

BURGLARY—Ownership in the General Occupant, Though Rooms Are Let to Lodgers—Breaking Into Basement Hallway Not Internally Connected With the Rest of the House.

1. In an information for burglary, it is proper to allege ownership in the person having the the visible occupancy and control of the premises burglarized.
2. Where a building in possession of, and occupied by, a person having the general charge and control thereof, has some of the rooms therein let to lodgers and for other purposes, the whole of the building is considered in law as the dwelling house of such person, in whom ownership should be alleged in an information for burglary.
3. Where a building thus occupied has a basement, some of the rooms of which are let to lodgers and for other purposes, and a hallway leading to the different rooms is in possession of, and used by, the person in charge of the building, in common with those occupying the rented rooms in such basement, and a burglary is committed by breaking in at the door of such hallway, *held* that ownership was properly charged as being in the person in possession and having charge and control of the premises.
4. Breaking into the basement hallway *held* to be a burglary of the dwelling house of the person residing in the building, and having the general charge and control thereof, although such basement is not connected internally with other portions of the building.
5. Evidence examined, and found to support the verdict and judgment. (Syllabus by the court.)

Error to District Court, Lancaster County; Hon. E. P. Holmes, Judge.

Rudy Hahn, convicted of burglary, brings error. Affirmed.

James E. Philpott, for the plaintiff in error.

T. C. Menger, Constantine J. Smythe, Attorney General, Willis D. Oldhom, Deputy, and Paul Pizey, for the State.

HOLCOMB, J. The defendant, plaintiff in error, was informed against for burglary of a dwelling house, the ownership of which was alleged to be in one Melvern Richardson. A trial resulted in a verdict of guilty and sentence of imprisonment in the penitentiary. It is claimed by his counsel that the evidence fails to support the verdict and judgment, in that the ownership of the property was not proven as alleged. This contention arises from, and is based upon, the character of the possession and occupancy by the said Richardson of the building alleged to have been broken into.

Briefly speaking, the evidence discloses that the building was a three-story brick, with stone basement, occupied by, and in possession of, said Richardson, who had charge of it on behalf of nonresident owners. Parts of the building were let to others for different uses. The party in possession for the owners had living apartments in the first story. There was an internal communication by means of a stairway between the first story and basement, which at the time of the offense was closed by locking the door of the room in the first story into which the stairway led, and which was used as a teaching room. The entrance into the basement being used at the time from the exterior of the building by means of a door and hallway directly under the steps which led into the first story. There were several rooms in the basement on both sides of the hallway. Three of the rooms on one side were occupied by a family as living rooms. On the other side of the hall were two rooms used as a kitchen and dining room, where a number boarded, and which were rented and managed by a person living in another building across the street. Some two or more rooms in the basement were unoccupied, except as to the possession and occupancy thereof by the person having charge and control of the entire building. The hallway was used in common by the said Richardson and those having rented the rooms, as before mentioned. The burglary was committed by breaking into this hallway.

The vital question is, therefore, whether, under the facts thus proven, the ownership of the property was properly laid in the said Richardson. It is insisted by counsel for defendant that because the basement rooms were not connected internally with the rooms on the first floor, and a part of them let to others for

the purposes mentioned, the ownership of the building burglarized should be alleged to be in one or the other of the two parties occupying the basement rooms as herein mentioned.

Without determining the legal effect of closing and keeping locked the door which connected, by an inside stairway, the rooms in the basement with those on the first floor, we think it appears from the evidence that the person living in, and having general charge and control of, the building, was the owner thereof in contemplation of law, when applied to the crime of burglary, as in the case at bar. She was in the undisputed and rightful possession of the building. She had the charge and control of the entire building, except only the rooms let to others. Such rooms did not constitute separate and distinct apartments. The basement hall, leading to the different rooms therein, was used in common by the owner and those occupying the rented rooms. The owner's possession of the hall and rooms not rented in the basement was as complete as if no rooms therein were rented. The building may, we think, fairly be said to be her dwelling house. Says Judge Maxwell, in his excellent work on Criminal Procedure: "The actual occupant, lawfully in possession of the building, and having exclusive use and control of the premises, no doubt is the proper party in whom to allege ownership,"—citing 2 Bishop, Criminal Procedure, Sec. 137. Says the same author also, in this connection: "The object is to describe the place where the offense was committed, not to determine the ownership of the property. Ownership, as against the burglar, means any possession which is rightful." Maxwell, Criminal Procedure, pp. 104, 105.

In *Winslow v. State*, 26 Neb. 308, 41 N. W. 1116, it is held in the first paragraph of the syllabus that "the name of the owner of the building broken into should be given, and for this purpose the person in the visible occupancy and control of the premises at the time of the burglary may be set out as the owner, whether he be the owner of the title or a tenant."

Where a dwelling house occupied by the owner has some of the rooms therein let to lodgers, the whole is considered in law as his dwelling house, and ownership, in an information for burglary, should be laid in the owner of the premises. 2 Bishop's New Criminal Law, Sec. 106; Bishop Statutory Crimes, Sec. 287, and cases there cited.

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As to the suggestion that breaking into the hallway in the basement of the building was not a burglary of the dwelling house of the occupant in possession, because the means of communication then existing between it and other parts of the house were only through an outer door, we think this fact does not deprive the entire building of the character of the dwelling house of the occupant. It was a part of one building under the same roof, and the mere fact of the outer entrance would not change its character. While as was said in the case of *Rex v. Sefton*, Russ. & Ry. [Eng.] 203, it may be "thought a case of much nicety," we regard the authorities as uniform in holding that the person inhabiting and in possession, either exclusively or in common with others, and having the general charge and control of such building, will be deemed the owner thereof, within the meaning of the criminal law relating to burglary. *Quinn v. People*, 71 N. Y. 561; *People v. Snyder*, 2 Parker's Cr. Rep. [N. Y.] 23; 2 East P. C. 506, 780; 2 Russell Crimes (9th ed.) 16.

The judgment of the trial court is supported by the evidence, and is affirmed.

STATE V. BOYSON.

30 Wash. 338—70 Pac. Rep. 740.

Decided November 28, 1902.

BURGLARY: *Entry made by reaching through a window and taking out property—Aider a principal—Evidence sufficient.*

1. Reaching in through a window and thereby taking out property is a sufficient entry.
2. It was proved that one person reached through a window took out property and handed it to another. Held, that it mattered not which made the actual entry, each was acting for and with the other and both were principals.
3. Evidence reviewed and held to be sufficient

Appeal from Superior Court, King County; Hon. Arthur E. Griffin, Judge.

L. F. Boysen, convicted of burglary, appeals. Affirmed.

Benson & Aust, for appellant.

Walter S. Fulton, Prosecuting Attorney, and *Vince H. Faben*, for the State.

DUNBAR, J. The appellant, together with one James Murphy,

was accused by information of the crime of burglary. Murphy pleaded guilty, and was sentenced to one year in the penitentiary. The appellant entered a plea of not guilty, and upon the trial, after the close of the State's testimony, his attorney moved the court for an order discharging the defendant and dismissing the jury. The motion was denied, and exception allowed. The defendant then testified on his own behalf, after which the State introduced testimony in rebuttal, and the case went to the jury, which returned a verdict of guilty as charged. A new trial was moved and denied, and a judgment of sentence of eighteen months in the penitentiary was pronounced. From that judgment this appeal is taken.

The assignment is that the court erred in not sustaining the motion of defendant for a discharge, and that the verdict is not supported by law nor the evidence in the case. We think neither contention is sustained by the record. It is contended by the appellant that there was no entry, and that the building alleged to have been burglarized was a small addition to a hotel and saloon, in which were stored provisions for the hotel. The cook testified that, upon hearing a crash which sounded like breaking glass, he got up, and looked, and saw a man reach in through the window, and take out hams, fresh meat, and bacon. His wife, who saw the performance, and who waked her husband when she heard the noise, testified that one man was reaching into the window, taking out the stores, and handing them to the other. The wife watched while the husband went around into the saloon and obtained assistance. As, with the assistance obtained, he came upon the scene, one of the men, who afterwards proved to be Murphy, attempted to jump over the wall, and was captured. The appellant ran up the stairway, refusing to obey the injunction to halt until he was shot in the leg by one of the posse. There was testimony that these men had been drinking together in the saloon during the evening, though the appellant testified that he did not know Murphy, and had never seen him. The contention of the appellant that no entry was shown to have been made by him is refuted by the testimony that the window was broken, and that one of them reached in, and removed the stores, and handed them to the other. It makes no difference whether the one who was removing the stores, and had actually entered the premises for that

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purpose, was the appellant or his accomplice. Each was a principal in the act, and each was acting for and with the other. The testimony, it is true, is not extensive, but is very pertinent, and surely sufficient to sustain the verdict of the jury.

The judgment is affirmed.

REAVIS, C. J., and ANDERS, FULLERTON, and MOUNT, JJ., concur.

STATE V. CRAWFORD.

8 N. D. 539—46 L. R. A. 312—80 N. W. Rep. 193.

Decided October 7, 1899.

BURGLARY: Entry by boring with an auger through the wall of a granary and thereby causing the grain to escape—Appeal by the State.

In cases of burglary, where one and the same instrument is used both for the purpose of breaking and for the purpose of committing an ulterior crime within the building, it will suffice to show an entry by showing that the instrument so used was thrust into the building and was used in committing the ulterior offense, without showing that the accused entered the building in person.

The defendant was informed against for the crime of burglary in the third degree. The evidence tended to show that the defendant in the night-time bored three holes with a two-inch auger through the walls of a granary, and into a mass of wheat stored therein. The weight of the grain forced several bushels of wheat to pass out of the aperture caused by the auger, which wheat, the evidence shows, was taken away and sold by the defendant. Upon this evidence the trial court directed the jury to acquit upon the ground that the evidence failed to show an entry into the granary. *Held*, that the ruling was error.

Held, further, that the intent to steal within the granary is sufficiently shown by the fact that the wheat which was stored inside of the granary was by defendant's agency transferred from the inside to the outside of the granary. It is true that the law of gravitation co-operated with the defendant in removing the wheat; but the defendant by his own act set the law in motion upon the inside of the building, and thereby, accomplished his criminal purpose.

(Syllabus by the court.)

Appeal from District Court, Cass County; Hon Charles A. Pollock, Judge.

John Crawford was indicted for burglary and acquitted. The State appeals. Reversed.

Fred B. Morrill, State's Attorney, (*Edward Engerud*, of counsel) for the appellants.

David R. Pierce, for respondent.

WALLIN, J. The record in this case shows that the defendant was charged with the crime of burglary in the third degree, by an information filed against him by the State's Attorney of the County of Cass, and that the defendant pleaded not guilty to such charge, whereupon a trial was had. At the close of the testimony offered in behalf of the State, and on motion of counsel for the defendant, the trial court advised and practically directed a verdict of acquittal, and such verdict was accordingly returned. The defendant was then discharged from custody, despite the protest of the State's Attorney, who requested the court to hold the defendant to bail pending an appeal of the case to this court. The State's Attorney assigns as error the direction to acquit, and the refusal of the trial court to hold the accused to bail pending the appeal.

There is no conflict of evidence in the case, nor is there any dispute between counsel as to the facts. The evidence shows that at the time and place stated in the information there was a certain building used as a granary, in which there was stored in bins about 800 bushels of wheat, and that in the night-time three holes were bored with a two-inch auger through the walls of the granary, and into one of the wheat bins. The three holes were so connected together as to make one large opening through the walls, and into the wheat bin. It further appears that there was a depression in the mass of wheat directly over the aperture made by the auger, indicating that wheat had passed out of the bin through such aperture to the amount of several bushels, and, further, that some wheat was spilled on the ground directly under the opening through the wall of the granary. Other evidence tended to connect the defendant with the felonious asportation and sale of the grain. Upon this evidence the question is presented whether the State had made out a *prima facie* case when the evidence closed and the State rested its case. Defendant's counsel contends that the State had failed to establish two of the three essential elements of the crime charged, viz., the entry into the granary, and the intent to steal therein. In support of this theory, attention is called to the evidence which

clearly indicates how the grain was extracted from the granary, and negatives the idea that the person who bored the holes through the walls went inside the building to steal therein, or for any purpose whatever. Nor is it claimed in behalf of the State that the accused personally went inside the granary for any purpose. As to the intent to steal inside the granary, the evidence, in our judgment, leaves no room for doubt. The accomplished fact clearly reveals the motive and purpose with which the act was done. The wheat was stored within the granary, and the evidence tends to show that the same was by the acts and agency of the accused taken possession of while in the granary, and removed from the inside of the granary to the outside, and was thereafter taken away from the premises in the night-time. The defendant, under the evidence, acquired dominion over the grain taken while the same was within the building, and his intention to do so is too clear for discussion. It is true that the accused was aided by natural laws in taking possession of the grain within the granary, but such laws were deliberately invoked and set in motion by the acts of the defendant, done by his agency operating within the building.

But counsel most strenuously contends that inasmuch as the evidence shows that the grain was removed through the opening made with an auger, and not otherwise, it therefore appears affirmatively that the defendant did not and could not have gone into the building, and hence that the State failed to establish the essential element of an entry. We cannot accept this conclusion from the evidence. It is manifest that the auger guided by the person who bored the holes passed through the walls of the granary into the mass of wheat therein, and also manifest that it was the auger operating within the building which set the law of gravitation in motion, and thereby enabled the man guiding the auger to remove the property from within the building to the outside. Using the auger for the double purpose of breaking and taking possession of the property within the building brings the case within the rule announced in the authorities hereafter cited. We quote first from the authorities cited by defendant's counsel. The rule is expressed in Bishop's New Criminal Law (volume 2, § 93) as follows: "And there is no burglary if simply the tool used for breaking goes in, and neither any part of the person nor the instrument by which the ulterior felony is

to be perpetrated does." The same section contains the following language: "Thus, to raise a window by placing the hands outside of it, and then thrust in a bar for forcing open the inside shutter, or to make a hole through a door with a centerbit, whereby some of the chips fall in, is insufficient, because neither the bar nor the centerbit was to be employed about the ulterior felony." Another text writer cited by defendant's counsel puts the rule as follows: "Whether the introduction of an instrument will be such an entry as to constitute burglary depends upon the object with which the instrument is employed. Thus, if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony; as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand is not in, this is an entry." See 1 Rosc. Cr. Ev. *366, citing other authority. The rule as announced in these authorities seems to be well established, and generally acquiesced in without dissent; and as, in our judgment, it applies to the facts of this case, it will govern our decision. As has been seen, we hold, under the evidence, that the auger was used first in breaking, and again deliberately used for the purpose of committing the ulterior crime of stealing wheat within the granary, thereby constituting an entry, within the rule. Counsel for the State has cited extracts from other text writers, but we deem it unnecessary to quote them in support of a rule so well established. The case of *Walker v. State*, 63 Ala. 49, is directly in point. In that case the crime charged was burglary, and it was committed by boring a hole with an auger into a granary in which grain was kept, and by this means the grain was removed from the granary. In the course of the opinion the court used the following language: "When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break, but to effect the only entry contemplated or necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his

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intent,—the offense is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib, the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law." This case seems to us not only to be intrinsically sound in legal principle, but one which apparently is sustained by the unanimous voice of authority upon the question. The order directing an acquittal will be reversed upon the ground that it was error to hold that the evidence did not tend to establish an entry. The case should have been submitted to the jury with proper instructions upon the matter of the entry, as well as upon the other legal aspects of the case.

We are of the opinion that this court cannot properly consider the other assignment of error, viz., that predicated upon the refusal of the trial court to hold the accused to bail pending an appeal from the order directing an acquittal. Such refusal occurred after the order appealed from was made, and the same is in no manner connected with the merits of the order from which an appeal is taken. All the judges concurring.

STATE v. MILLER.

24 Utah 312—67 Pac. Rep. 790.

Decided February 17, 1902.

BURGLARY: *Statute limits it to the night-time, and defines the term "night-time"—Evidence fails to prove it in the night-time.*

1. In Utah the statute limits burglary to the night-time, and, defines night-time as the period between sun-set and sun-rise.
2. The evidence showed that the breaking was between 9:30 p. m. and 6:30 a. m. and that the sun rose at 5:22 a. m.—Held, that burglary was not proven.

Appeal from District Court, Weber County; Hon. H. H. Rolapp, Judge.

Arthur Miller, convicted of burglary, appeals. Reversed.

Elijah Farr, for the appellant.

M. A. Breeden, Attorney General, and *W. R. White*, Deputy Attorney General, for the State.

BARTCH, J. The defendant was convicted of the crime of burglary, alleged to have been committed on July 2, 1901, by unlawfully and feloniously entering a store in the night-time in Ogden, with intent to commit larceny. The evidence showed that on the 2d of July, 1901, the owner of the store closed it up and quit business for that day at 9:30 p. m., and opened it up again the next morning at 6:30 a. m., when he found that it had been broken into, and some of the goods, which were all there when he closed, at 9:30 p. m., were missing. On that day the sun arose at 22 minutes of 5 o'clock a. m. Later in the day, it appears, the missing goods were found in the possession of the defendant, who was trying to sell them. When arrested, the prisoner claimed he got the goods from another man. Such is the character of the evidence upon which the conviction of the offense is based. The appellant insists that the evidence is insufficient to warrant the conviction. This point seems to be well taken. Section 4334, Rev. St., so far as material here, provides: "Every person who, in the night-time, forcibly breaks and enters, or without force enters through any open door, window, or other aperture, any house, room, apartment, * * * store, * * * with intent to commit larceny or any felony, is guilty of burglary." Section 4338, Rev. St., reads: "The phrase 'night-time,' as used in this chapter, means the period between sunset and sunrise." Under these provisions of the statute it will be seen that, even though a building of the kind mentioned be broken into and goods stolen, the offense does not amount to burglary unless committed between sunset and sunrise. From the evidence it appears the goods were stolen some time between 9:30 in the evening and 6:30 in the morning. But 6:30 a. m. is nearly two hours after sunrise; hence, if it be admitted that the defendant was proven to have taken the goods, still it is impossible to say from the proof that he took them in the night-time, for he may have taken them after sunrise and before 6:30 a. m. Nor are there any circumstances in evidence of such a character as to show beyond a reasonable doubt that the prisoner took the goods in the night-time. If he broke into

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the store and stole them in the day time, after sunrise, the offense was not burglary. An essential element of the crime of burglary is that the offense was committed—the acts done—in the night-time. Evidence of this is wholly wanting in this case. The record contains no proof of the crime itself, and the conviction of the prisoner of burglary is therefore unwarranted. In *State v. Gray*, 23 Nev. 301, 46 Pac. 801,—a case quite similar to the one at bar,—it was said: "The defendant was convicted of burglary, and, admitting that the evidence was sufficient to support the conclusion that the defendant entered the barn and stole the saddle therefrom, there was nothing to prove that it was done in the night-time, and nothing from which that fact could be inferred. We may suspicion quite strongly that it was, but suspicions, however strong, are not sufficient to convict men of crime. There must be evidence of every essential element of the crime, and it must be of sufficient weight to convince an impartial jury beyond reasonable doubt."

The judgment is reversed, and the cause remanded.

MINER, C. J., and BASKIN, J., concur.

Note (By J. F. G.) Webster defines the word, "night" as: "That part of the natural day when the sun is beneath the horizon, or the time from sunset to sunrise." This may be the dividing line when only the words "day" and "night" are being *contra* distinguished; but in general usage the words are very elastic and take their meaning from their application to the subject then under consideration. Thus, according to Webster the word "day" may mean, "the whole time or period of a revolution of the earth on its axis, or twenty-four hours, called the *natural day*;" or "that part of the time of the earth's revolution on its axis, in which its surface is exposed to the sun; the part of the twenty-four hours when it is light; or the space of time between the rising and setting of the sun; called the *artificial day*." In ordinary contemplation, *evening* is a natural period which precedes the night, although it may continue a considerable time after sunset; so *morning*, which commences before sunrise *follows* the night. In construing contracts the term "day" may include the entire time from mid-night to mid-night, while in measuring the period of a sentence of imprisonment the law considers the day on which the sentence is pronounced as an entire day, even though the sentence is pronounced or entered in the afternoon; thus; a sentence of imprisonment for the period of one day, pronounced and carried into effect at 4 o'clock in the afternoon, would expire upon the same calendar day; and, most probably before dark; for it would not only be of great inconvenience to sheriffs and jailors to attend the jails at mid-night; but would be against public

policy to turn prisoners at liberty at so unseemly an hour. As to the exact time when a prisoner is entitled to his liberty there may be diversity of opinion, and, the writer does not have in mind any authority directly in point; but a reasonable view might fix it at sunset, or, such other suitable time, when by common usage, the sheriff or jailor is about to close the jail for the night.

At first glance our review of this subject may seem to have but little if any application to a case decided upon the terms of a statute in which the term "night-time" is expressly defined; but while the decision of the court under the statute, as it would also be under the common law, is correct, we consider that the statute governing the case is a subject for grave criticism.

The legislators who enacted the statute in Utah defining burglary, evidently had not in mind the wisdom of the common law founded on the judicial experience of centuries. (For general review of this subject, see notes on pages, 73-89.) The additional security which the common law relating to the crime of burglary gave to the home, whose occupants had retired from their day's activities into its enclosures, had no dependence on, or connection with, the exact moment of sun-rising or sun-setting; but the term "night-time" in its application to the crime of burglary, meant a natural condition, when a person's countenance was not discernable by the light of day. The severe punishment for the common law offense of burglary was intended to operate on those, who *in the shadow of night* feloniously broke and entered the sacred precincts of the home at a time when the means of protection was lessened, as well as those of the detection, identification or capture of the culprit.

On pages 278-9 of his Digest of Criminal Evidence, Mr. Roscoe so clearly reviews this phase of the law of burglary, giving authorities, that we close this note by three paragraphs, in the language of Mr. Roscoe, as follows:

(Proof of the offense having been committed in the night-time.)

The prosecutor must prove that both the breaking and entering took place in the night-time, but it is not necessary that both should have taken place on the same night. It is said by Lord Hale that if thieves break a hole in the house one night to the intent to enter another night, and commit a felony, through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both noctanter, though not the same night, and it shall be supposed they broke and entered the night they entered, for the breaking makes not the burglary till the entry. 1 Hale, P. C. 551. This point was lately decided in the following case: In the night of Friday the side door of the prosecutor's house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night the prisoner entered through the hole thus made. On a case reserved, the judges were of the opinion that the offense amounted to burglary, the breaking and entering being both by night. And although a day elapsed

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between the breaking and entering, yet the breaking was originally with intent to enter. *John Smith's Case*, Russ & Ry. 417.

With regard to what shall be esteemed *night*, it is said by Lord Hale to have been anciently held that, after sunset, though daylight be not quite gone or before sun-rising, is noctanter, to make a burglary, (Dalt. c. 99. Crompt. 32. b); but he adds, that the better opinion has been, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun, or crepusculum, it is not night. 1 Hale, P. C. 550, 3 Inst. 63. This rule, however, does not apply to moonlight, otherwise many burglaries might pass unpunished. 1 Hale. 551 4 Bl. Com. 224.

"If the breaking of the house," says Lord Hale, "were done in the day-time, and the entering in the night, or the breaking in the night and the entering in the day, that will not be burglary; for both make the offense, and both must be noctanter." 1 Hale, P. C. 551, citing Crompt. 33, a. ex. 8, Ed. 2. Upon this, the annotator of Lord Hale observes, that "the case cited does not fully prove the point it is brought for, the resolution being only, that if thieves enter at night in a hole in the wall which was there before, it is not burglary, but it does not appear who made the hole." 1 Hale, P. C. 551 (n). It is observed by Mr. Sergeant Russell, that it is elsewhere given as a reason by Lord Hale, why the breaking and entering if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry and the learned writer adds, that "this reasoning, if applied to a breaking in the day-time and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry a burglary." 2 Russell, 32, and see 2 East, P. C. 509. It would seem, however, to be carrying the presumption much farther than in the case put by Lord Hale; and it may well be doubted, whether, in such a case, the offense would be held to amount to burglary.

BROWN v. STATE.

81 Miss. 143—33 So. Rep. 170.

Decided January 5, 1903.

BURGLARY—ARGUMENT OF COUNSEL: *The building properly described as that of the tenant—Improper remarks of counsel; but evidence clear and judgment affirmed—Test as to reversible error.*

1. In an indictment for burglarizing a leased building, it should be described as the house of the tenant.
2. In his address to the jury, the District Attorney said: "If you are going to do like the juries did last week, and turn everybody loose I tried, regardless of evidence, why I just as well close up shop. If you are going to believe the defendant, this entire court is a

farce; and he never denied his guilt until he got counsel." Held, that the remarks were improper, and, in a doubtful case would be cause for reversal, but, in this instance, guilt was overwhelmingly shown. The test as to reversible error, on this, as on other grounds, is: "Would the result clearly and certainly been the same, notwithstanding the error?"

Appeal from the Circuit Court, Pike County; Hon. Jeff Truly, Judge.

Dudley Brown, convicted of burglary, appeals. Affirmed.

The indictment charged that the accused broke and entered the storehouse of L. Aaronson. By the testimony it appeared, that the building was owned by one Moyise; but was rented to Aaronson, who occupied and used it as a storehouse at the time of the alleged burglary. The defendant asked, and the court refused, the following instruction:

"If the jury believe in this case beyond all reasonable doubt that the storehouse alleged to have been broken into was not the property of L. Aaronson, as alleged in said indictment, you must find the defendant not guilty."

In his address to the jury the District Attorney made the following remarks, to which objection was made by the defendant:

"If you are going to do like the juries did last week, and turn everybody loose I tried, regardless of evidence, why I just as well close up shop. If you are going to believe the defendant, this entire court is a farce; and he never denied his guilt until he got counsel."

Ratcliff & Wall for the appellant.

William Williams, Assistant Attorney General, for the State.

WHITFIELD, C. J. The ownership was properly laid in Aaronson. He had rented the house as a storehouse, occupied it and used it as such, and the goods were stolen therefrom.

In *Webb v. State*, 52 Ala. 423, the rule is thus correctly stated: "The authorities collected in the best text books on criminal procedure justify us in declaring that, where there is a right to the use and occupation of the building in one who is actually occupying, distinct from the ownership of the freehold or the reversionary right on the expiration of the term of the occupier,

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the ownership is properly laid in the occupier. 2 Bish. Cr. Proc. § 109; 1 Russ. Crimes, 806-820; 2 Whart. Cr. Law, 1577-1591."

Rex v. Rees, 7 Car. & P. 568, 32 E. C. L. 633, is a striking case. A gardner lived in a house of his master, quite separate from the dwelling houes of his master, and the gardner had the entire control of the house. He lived in it, slept in it, and kept the key. Held, that on an indictment for burglary the gardener's house might be laid either as his or his master's. To the same effect are the following cases: *Houston v. State*, 38 Ga. 165; *State v. Rand*, 33 N. H., at page 227; *Markham v. State*, 25 Ga. 52. Counsel misconceives *James v. State*, 77 Miss. 372, 26 South. 929, 78 Am. St. Rep. 527.

What is said there must be taken, of course, in connection with the facts of the case. The only party in whom ownership of the railroad car could have been laid in that case was the Illinois Central Railroad Company. The ownership was properly laid in the indictment in the Illinois Central Railroad Company, but the difficulty in the case was there was no proof that any such railroad company existed; in other words, the failure in that case was to prove the ownership as laid. Here the question is whether the ownership was properly laid.

So far as the argument of the District Attorney is concerned, it needs only to be said that it was improper, and in a doubtful case would cause a reversal. Here guilt is overwhelmingly shown. The test is, as to reversible error, on this, as on other grounds, would the result clearly and certainly have been the same, notwithstanding the error?

Affirmed.

McNUTT v. STATE.

68 Neb. 207—94 N. W. Rep. 143.

Decided March 18, 1903.

BURGLARY: *Description of drug store—Statute—Proof of ownership of store and goods—Proof of goods as described—Instruction as to possession of stolen goods—Improper conduct of sheriff in obtaining a confession—Subsequent confession.*

1. In an information for burglary, a drug store is properly described as a "store house, commonly called a drug store."

2. Evidence found sufficient to support the allegation of the ownership of the building burglarized and property stolen.
3. In a prosecution for burglary and larceny, the proof must agree with the allegations of the information in the description of the property, but when the property stolen is described in the information as "one Elgin gold watch" and "thirty-two gold watch chains," the verdict will not be set aside as unsupported by the evidence because no witness testified that the articles were gold, if the articles are produced and offered in evidence at the trial, and there is nothing in the record to show that the jury could not determine the truth of the allegation from an inspection of the articles.
4. The conduct of the sheriff, who, upon arresting one charged with crime, immediately furnishes him with intoxicating liquors and proceeds to question him for the purpose of obtaining evidence against him, is unjustifiable, and the evidence of admissions made under such circumstances should be excluded.
5. But the admission of such evidence will not be held prejudicial, so as to require a reversal, if there is uncontradicted evidence that the defendant afterwards, when free from the influence of liquor, and without any undue influence of any kind being brought to bear upon him, made the same admissions to various other persons.
(Syllabus by the court.)

Error to District Court, Cedar County; Hon. Guy L. Graves, Judge.

Albert T. McNutt, informed against as "Thomas E. Shaw," convicted of burglary, brings error. Affirmed.

Addison M. Gooding, for plaintiff in error.

Frank N. Prout, Attorney General, *Morris Brown*, and *R. J. Millard*, for the State.

SEDGWICK, J. The defendant was convicted in the District Court of Cedar County of the crime of burglary, and has brought the case here for review. The information described the building as "a certain storehouse, commonly called a drug store, owned and occupied by Henry D. Spork and Loyd K. Spielman." The proof was that the building was a drug store, and the question is whether, under the statute, a drug store is properly described in the information as "a certain storehouse, commonly called a drug store." It could not be better described under our statute. If this description is bad, no prosecution can be had for the burglary of a drug store. The statute, (Criminal Code, Sec. 48), in naming the buildings that may be the subject of burglary, does not use the word "store" unconnected with

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the word "house," but does use the words "shop," "warehouse," and "storehouse," and there can be no doubt that a store building or a storehouse is included, and is made the subject of burglary by the statute, nor can there be any doubt that the words "storehouse, commonly called a drug store" sufficiently and properly described the building burglarized in this case.

2. It is contended that the proof does not show that the building and the property stolen were the property and building of Henry D. Spork and Loyd K. Spielman. The witnesses testified that the building was owned and occupied by the firm of Spork & Spielman, and that the property stolen was the property of the firm of Spork & Spielman, and that the firm of Spork & Spielman was Loyd K. Spielman and Henry D. Spork. This, being uncontradicted, is sufficient to prove that the property and building were owned and occupied by "Henry D. Spork and Loyd K. Spielman, who were doing business under the firm name and style of Spork and Spielman," as charged in the information.

3. The property stolen was described in the information as "one Elgin gold watch, of the value of twenty-five dollars, the property of said Spork and Spielman, and thirty-two gold watch chains of the value of four dollars each, the property of said Spork and Spielman." Of course, the objection that this is not a sufficient allegation that these goods were the property of Henry D. Spork and Loyd K. Spielman is without any merit, since the words the "said Spork and Spielman" in this allegation must necessarily refer to the former allegation, in which the parties are fully named. But it is insisted that there is no evidence in the record that the watch was a gold watch, or the chains were gold chains, and we find upon examination of the record that no witness testified to that effect; but the record shows that the watch and the chains were in court, and were offered in evidence before the jury, and, the jury having found that the allegations were true, this evidence must be considered sufficient to support such finding in the absence of any evidence to the contrary.

4. It is complained that the court in its instructions referred to "said Spork and Spielman," instead of naming them in full, "Henry D. Spork and Loyd K. Spielman," as owners of the

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property and building; but the court, having first described them by their full names, might properly afterwards refer to them as "the said Spork & Spielman."

5. By instruction No. 10 the court told the jury that possession of the stolen property immediately after the offense was committed was a criminating circumstance, "unless the evidence and the facts and circumstances proved show that he may have come honestly in the possession of the same," and it is urged that this places the burden upon the defendant to prove that he acquired the goods honestly, and, as the defendant admitted upon the trial that he knew that the goods were stolen, it is urged that this instruction was prejudicial. There seems to be no reason why the jury should not consider the defendant's admissions in that regard in determining whether there was reason to believe that he obtained the property honestly.

Objection is also made to other instructions of the court, nine of them being specified in the brief as erroneous, but without pointing out any particular in which we are able to discover error. Also a number of instructions were requested by the defendant and refused by the court. Upon examination of those requested, we are unable to find any substantial matter which the defendant was entitled to have given to the jury not sufficiently and properly explained in the instructions given by the court.

The State showed, by the evidence of several witnesses, admissions made by the defendant as to his connection with the burglary complained of, and it is urged that it was not sufficiently shown that no inducements were offered the defendant to procure the admissions testified to, and in this connection it is shown that immediately after the defendant's arrest, while the sheriff who arrested him was returning him to Hartington, where the crime was committed, the sheriff not only allowed the defendant to have intoxicating drinks, but himself furnished such drinks to the defendant, and afterwards questioned the defendant in regard to the offense. Such conduct on the part of the sheriff is not justifiable, and, under ordinary circumstances, the admitting in evidence of the testimony in regard to admissions so obtained would be erroneous and require a reversal of the judgment of conviction; but in this case the evidence of the defendant himself shows that this conduct of the sheriff

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was due rather to thoughtlessness than to any attempt on his part to procure damaging evidence against the defendant, and also shows that the defendant afterwards, of his own free will, repeated the same statements to several other parties, and made other similar statements in open court upon his preliminary examination; so that it is impossible to believe that the defendant has been prejudiced by this improper conduct of the sheriff. Upon considering the whole evidence, it is difficult to see how the jury could have arrived at any other verdict than the one reached. The trial appears to have been carefully conducted by the court, with a view of protecting the defendant in all his rights.

We find no error in the record, and the judgment is affirmed.

MINTER v. STATE.

71 Ark. 178—71 S. W. Rep. 944.

Decided January 10, 1903.

BURGLARY—BREAKING: *Arkansas statute—To constitute burglary an entry is not necessary; but the breaking must effect an opening or means of entrance.*

1. In Arkansas the crime of burglary may be completed by a felonious breaking, without an entry; but in such case there must be an actual breaking, i. e., the making an opening or mode of entrance into the building by force.
2. The evidence showed that several slats about six inches outside of the window were removed and also the putty and tacks holding a pane of glass in the window, but that the glass and sash remained in place and was between the defendant and the inside of the house. Held: —that the evidence did not show either a breaking of or entry into the house.

Appeal from Circuit Court, Phillips County; Hon. Hance N. Hutton, Judge.

Jeff Minter, convicted of burglary, appeals. Reversed.

James C. Tappan and *R. W. Nichols*, for the appellant.

George W. Murphy, Attorney General, for the State.

RIDDICK, J. The defendant, Jeff Minter, was tried and convicted on an indictment charging him with having committed the crime of burglary by breaking into the storehouse of Wooten

& Agee, with the intent to commit a felony. No objection is made to the indictment, but it is contended that the evidence does not show that any crime was committed. The facts are that a night watchman on a night in July saw a man whom he believed to be the defendant standing at the window of the store of Wooten & Agee. When the watchman approached, the man ran away; and the watchman examined the window, and found that two slats on the outside of the window, and about six inches from it, had been broken, and that the putty and tacks holding a pane of glass in the window sash had been taken out, but the glass was still in place, and no opening had been made into the house.

Under our statute, it is no longer necessary, as at common law, to show both a breaking and an entering of the house, to make out the crime of burglary; but, in this State, if one either break or enter the house of another in the night-time with intent to commit a felony, he is guilty of burglary. Sand. & H. Dig. §§ 1492, 1494. But it is necessary to show either a breaking or an entrance. No one contends that there was any entry of the house by the defendant in this case, and, in our opinion, no breaking is shown. Actual breaking, as applied to burglary, means the making of an opening or mode of entrance into a building by force. 5 Am. & Eng. Enc. Law (2d Ed.) 45; Bishop, Stat. Crimes (3d Ed.) 312.

But the evidence does not show that any opening was made into the house. The defendant removed some slats on the outside of the window, and removed some tacks and putty from the window sash; but the glass of the window sash was still in place, and was between the defendant and the inside of the house. We are therefore of the opinion that the evidence did not show either a breaking or an entry into the house, and that the crime charged was not proved. *State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314; 2 Bishop, New Crim. Law, § 95.

Judgment reversed, and cause remanded for a new trial.

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YOUNG v. STATE.

42 Texas Crim. Rep. 301—59 S. W. Rep. 890.

Decided December 12, 1900.

BURGLARY—INDICTMENT: *Indictment for burglary of property of joint owners should allege non-consent of each.*

An indictment alleging the burglarious entry of a house belonging to two persons, with intent to steal therefrom the property of the owners or *either of them*, without *their* consent, is insufficient, in that, it does not allege that it was without the consent of *either* of them.

Appeal from District Court, Nacogdoches County; Hon. Thomas C. Davis, Judge.

John Young, convicted of burglary, appeals. Reversed.

F. W. Brewer, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of burglary, and given two years in the penitentiary. The motion in arrest of judgment questions the validity of the indictment, in alleging want of consent of the two joint owners to the theft of the property charged to have been in the burglarized house.

We have examined the indictment, and it alleges that the property (the house) belonged to J. H. Summers and J. F. Summers, and that appellant burglariously entered the same with intent then and there, etc., to take from said house certain property therein situated, belonging to the said J. H. Summers and J. F. Summers, from the possession of the said J. H. Summers and J. F. Summers or either of them, and without their consent, etc. The sentence "or either of them" appears in connection with their possession, and does not appear to refer to their consent. So that this allegation is lacking in connection with the want of consent of said parties. In accordance with the previous decisions of this court, the indictment is insufficient. *McIntosh v. State*, 18 Tex. App. 284; *Taylor v. Same*, Id. 489; *Williams v. Same*, 23 Tex. App. 619, 5 S. W. 129.

The holding of the court in these decisions seems to be predicated on the idea that where property is alleged to belong to joint owners, and to have been taken from the possession of

such joint owners, the want of the consent of each must be distinctly averred; the use of the word "their" being held to refer to them collectively, and not to be tantamount to negating the consent of each of them.

The judgment is reversed, and the prosecution ordered dismissed.

Reversed and dismissed.

GILBERT V. STATE.

116 Ga. 819—43 S. E. Rep. 47.

Decided December 13, 1902.

BURGLARY: *Indictment—Allegation of ownership—Review of the evidence.*

1. An indictment which charges that the accused broke and entered a certain railroad car marked "C. of Ga. 201," and alleges that such car was at the time "in the custody and control" of another named railway company, sufficiently avers ownership of the car to have been in such company. See *Adkins v. State*, 41 S. E. 987, 115 Ga. 582; Clark, Cr. Law (2d. Ed.) p. 277; 2 Bish. New Cr. Law. § 789 (2); *Com. v. Finn*, 108 Mass. 466.
2. The above ruling is not in conflict with the decision in *Cooper v. State*, 15 S. E. 201, 89 Ga. 222; the averment in that case being simply that the car was on a named railway in the county. Even if there is a conflict, the ruling in the case cited was by two justices only, and is therefore not absolutely binding as authority.
3. Where, in the trial of one charged with breaking and entering a railroad car, the evidence showed that the goods stolen were in the car; that it was sealed; that it passed through the place where the accused resided, and was delayed there two days in the yard of the company by which the accused was employed as a car inspector; that the car could be opened without breaking the seals; that the accused knew how to do this; that he had tools which could be used for the purpose; that the stolen goods were found in his possession in the yard of the company in the place where he resided a few days after the car passed through the county of his residence; and that he made no satisfactory explanation of his possession,—the jury were authorized to find, not only that the accused broke and entered the car, but also that the breaking and entering was accomplished in the county of his residence, notwithstanding the car, after having been sealed, passed through several counties in the State, and into an adjoining State, before reaching its destination, and also notwithstanding there were no visible signs of a breaking upon the car.
4. The foregoing notes deal with all questions insisted on in the brief. There was no error in refusing a new trial.

Little, J. dissenting.

(Syllabus by the court.)

Error from Superior Court, Ware County; Hon. J. W. Bennett, Judge.

G. F. Gilbert, convicted of burglary, brings error. Affirmed.

Leon A. Wilson and Toomer & Reynolds, for plaintiff in error.
John W. Bennett, Solicitor General, *S. W. Hitch*, *John C. McDonald* and *W. E. Kay* for the State.

COBB, J. Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding, and LITTLE, J., dissenting.

LITTLE, J. I dissent from the judgment in this case because there can be no lawful conviction for burglary in the absence of evidence showing a breaking, and no evidence of any character appears in the record that there was any breaking of the car from which the goods were taken.

STATE v. WILSON.

66 Kan. 472—71 Pac. Rep. 849.

Decided March 7, 1903.

BURGLARY—INFORMATION—INSTRUCTIONS—REASONABLE DOUBT: *Allegations as to the value of coins, etc.—Necessity to instruct the jury to disregard all evidence which has been excluded by the court—No necessity to define the term, reasonable doubt—Instruction trenching dangerously near to a reference to the fact that defendant did not testify.*

1. An information for burglary, and the larceny of \$1,933, in which the money taken is alleged to consist of about \$1,400 in bank bills, treasury notes, gold and silver certificates, about \$380 in gold coins, about 115 \$1 silver pieces, and the remainder of the \$1,933 to consist of subsidiary coins, all current lawful money of the United States, is sufficient in charging the value of the property taken.
2. Instrumentalities which it was claimed by the State had been employed in the commission of a crime were produced at the trial, and used by witnesses for the State before the jury to illustrate their evidence and explain the manner in which the crime might have been committed, but when offered in evidence, they were excluded, because not properly identified and connected with the commission of the offense. *Held*, that the court erred in refusing to instruct the jury

to disregard such instrumentalities, and all evidence based thereon, in determining the guilt or innocence of the defendant.
(Syllabus by the court.)

(Additional syllabus by J. F. G.)

3. The term "reasonable doubt" is so simple and free from ambiguity, that it best defines itself.
4. An instruction, which appears in the opinion, held to "trench dangerously near error" in commenting on the fact that defendant did not testify in his own behalf; yet that it was the same as approved in a previous case.

Appeal from District Court, Rawlins County; Hon. J. R. Hamilton, Judge.

M. A. Wilson, convicted of burglary, appeals. Reversed.

Jno. E. Hessin, Albert Hemming, and Dempster Scott, for appellant.

C. C. Coleman, Attorney General, *J. H. Briney*, County Attorney, *J. P. Noble*, and *Fred Robertson*, for the State.

POLLOCK, J. About 4 o'clock on the morning of December 22, 1901, the safe in the office of the county treasurer of Rawlins County, at Atwood, was blown open, and a large sum of money, in the aggregate about \$1,933, was taken therefrom. Appellant was arrested, charged, tried, convicted of this offense, and appeals to this court.

The evidence is entirely circumstantial. Appellant, a married man, stayed at night on a farm close to the town. His family lived in a building not far from the scene of the crime. After the commission of the crime, a reward was offered for the apprehension and conviction of the offender. A searching party found on the farm of appellant, under a tool box, a wrench and brace; also, in a stream of water, a crowbar—of which instruments much use was made by the State on the trial. There was also evidence of some one running to the rooms occupied by the family of appellant about the time the offense is alleged to have been committed; evidence of a trip made by appellant to Nebraska after the offense was committed, and his there registering at hotels under an assumed address; of excavations made in a plum thicket on appellant's farm; of his meeting with strangers after the commission of the offense at a hotel in Colby; of a secret hiding place on the farm of appellant. In the safe burglarized there was a Columbian coin. There was

also evidence that appellant exhibited, after the date of the commission of the offense, a Columbian coin, and evidence of other facts and circumstances claimed to be of a suspicious nature, and tending to connect appellant with the commission of the offense.

It is first insisted by counsel for the State that this appeal must be dismissed for want of proper certificate to the bill of exceptions found in the record. We are inclined to think, however, the same is sufficient.

Many grounds of error are specified and called to our attention in argument. It is first insisted there was error in refusing to quash the information, for the reason it fails to allege the value of the money taken. The information charges the larceny of \$1,400 in bank bills, treasury notes, gold and silver certificates, about \$380 in gold coins, 115 silver dollar pieces, and the remainder of the amount taken in subsidiary coins, all current lawful money of the United States. This we think sufficient, especially as judicial notice will be taken of the fact that the gold dollar is the unit of value under the monetary system of this government. *The State v. Eastman*, 62 Kan. 353, 63 Pac. 597.

Again, it is insisted the court erred in failing to define for the information of the jury the term "reasonable doubt," used in the instructions. This term is so simple, clear and free from ambiguity or technical learning that it best defines itself. Any attempt to define is liable to prove more confusing to the mind of the average juror than the use of the term without definition. *The State v. Davis*, 48 Kan. 1, 28 Pac. 1092; *The State v. Kearley*, 26 Kan. 77; *State v. Bridges*, 29 Kan. 138.

Instruction 13 in the charge of the court to the jury reads as follows:

"Where evidence would rebut or explain circumstances of a grave or suspicious nature, is peculiarly within the defendant's knowledge and reach, if you find there are such facts and circumstances in this case, and if you shall further find that defendant has made no effort to procure such evidence, then you may properly take such facts into consideration in determining the defendant's guilt or innocence."

The defendant did not offer himself as a witness in his own behalf. In instruction 15½ the court charged the jury as follows:

"The court instructs the jury that, while the statute of this State provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so; and the statute expressly declares that his neglect to testify shall not create any presumption against him."

It is earnestly insisted by counsel for appellant the instruction number 13 nullifies that portion of section 215 of the Criminal Code (Gen. Stat. 1901 § 5657) which provides:

"That the neglect or refusal of the person on trial to testify, or of a wife to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place."

As the instruction given is, in substance, the same as that given in *The State v. Greve*, 17 Kan. 458, which was approved by this court, and as that case was in its main features not unlike the case at bar, we are not inclined to hold the instruction to be prejudicial error. It does, however, trench dangerously near error in a case in which the evidence is wholly circumstantial.

There is one ground of error more serious in its nature, which we shall now consider. It arises upon the introduction of testimony. There was found upon the farm of appellant, after the commission of the offense, a wrench, a brace, and a crowbar. How these implements came there was not shown. Whether they were the property of appellant, or were there placed by appellant, is not shown except from the inference to be drawn from their location when found. Upon the trial they were produced in court, and used by P. Mostan, a detective, of Omaha, a witness for the State, in part, as follows:

"Q. What is the habit of burglars as to the use of tools, say a wrench and a crowbar and the ordinary tools used for this purpose?

A. Well, a professional burglar hardly ever carries anything with him except a drill and the explosives, and he gets the other tools in the locality in which the crime is committed.

Q. What is usually done with these commonplace tools, such as a crowbar and a wrench?

A. My experience has been that they leave them at the scene of the crime.

Q. I hand you this wrench, and ask you to examine it carefully, and say whether you have examined it before.

A. Yes, sir; I have seen this wrench before.

Q. I will ask you to say whether there are any indications on that wrench to show that it was used in the operation of a burglary, such as you have described?

A. Well, I could not say positively that it was used in the operation of a burglary, but it has had pretty hard usage, and the manner in which it sets there, it is about the size of the bolt or screw that was used in the jack or clamp.

Q. By the burglar?

A. Yes, sir.

Q. What do you mean by being set?

A. You cannot work it. It has been broken, but that is the manner in which it was worked.

Q. You cannot change that?

A. No, sir.

Q. Are there any marks or indications to show how they may have been used?

A. There are some marks along here that appear to be recently marred, and there is an impression on these threads.

Q. I hand you this brace, captain, and ask you to state to the jury whether that is such a brace as may be used in the opening of a safe such as you have described.

A. Yes, this brace could be used in drilling a hole of that character. It is a brace, as I understand it, used by blacksmiths and wagonmakers for heavy work.

Q. Now, I will ask you to take this bar, captain, and say to the jury whether there are any marks that would indicate that that bar has been used in the opening of a safe similar to this one.

A. Yes, sir; there are.

Q. Please indicate to the jury what these marks are.

A. They are marks on the bar.

Q. Point to them so the jury can see.

A. There are some marks on the bar, on both sides, all along there.

Q. Which are the marks?

A. Here they are.

H. F. Marshall also testified as follows:

Q. Was there room on the top of that safe for a person to stand and use the bar from the top of this door?

A. Yes, sir.

Q. Do you remember, when you made the examination of that bar at that time, whether you discovered any foreign substance on the bar itself?

A. I did.

Q. What was it?

A. It was the color of brass.

Q. Did you observe any foreign substance, and state what it was?

A. It seemed to be some of the filling of the safe.

Q. What do you mean by the filling of the safe?

A. White substance," etc.

There is much evidence of a similar character in the record. A portion of this evidence was received over the objection of counsel for defendant. The crowbar, wrench, and brace referred to by the witness were thereafter offered in evidence by the State, and excluded by the court, because not sufficiently identified. The defendant then requested the following instructions with reference thereto, which were refused:

"(1) You are instructed that you must not take into consideration any measurements, marks or indentations made upon or about the safe, or any attachment to it, in connection with the crowbar, monkey wrench, or brace which were exhibited before you during the trial, in determining whether the defendant is guilty or innocent of the crime charged.

(2) I instruct you that the crowbar, brace, monkey wrench, and silver coin that were exhibited before you during the trial were not admitted in evidence, and they should not be taken into consideration by you in any manner in arriving at the guilt or innocence of the defendant.

(3) I instruct you that you must not take into consideration the crowbar, brace, monkey wrench, and silver coin that were exhibited before you during the trial in determining whether the defendant is guilty or innocent of the crime charged against him in the information."

The court in its charge to the jury did not refer to the testi-

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mony given in reference to these instruments produced, the marks upon them, or the purposes for which they might have been used in the commission of the crime. Nor was this evidence withdrawn from the consideration of the jury by an instruction to disregard it. It is quite clear, if these instruments had been properly identified as used in connection with the commission of the crime, and defendant's possession or ownership of them had been shown, their reception in evidence and the use made of them by witnesses for the State in the way of explanation and illustration before the jury, would have been proper. But as these instruments were, in their nature, harmless, and well adapted to an honest use, and as they were not identified as instruments in the possession of or owned by the defendant, and as the evidence wholly failed to establish their use in connection with the commission of the offense, they were properly excluded when offered in evidence; and, being thus properly excluded, all evidence in connection therewith, and their use by the witnesses and counsel for the State, also should have been, by proper instructions, withdrawn from the consideration of the jury. The same is true of the Columbian coin, to which like reference was made. The better practice in such cases as this, where instrumentalities claimed to have been used in the commission of an offense are sought to be used for the purpose of illustrating testimony before the jury, is to first require their proper identification; but, if this is not required, and such use is made of them upon the assumption or promise of the State that it will thereafter make proper identification, and this is not done, not only should the instrumentalities themselves be excluded from the evidence, as was done in this case, but the jury should also be instructed to disregard them, and all evidence based thereon, in determining the guilt or innocence of accused.

In failing to so instruct in this case, error was committed, for which the judgment must be reversed, and a new trial ordered.

All the justices concurring.

PEOPLE V. WEBBER.

133 Cal. 623—66 Pac. Rep. 38.

Decided August 10, 1901.

BURGLARY—INDICTMENT PRACTICE: *Venue not alleged—Point good in motion in arrest of judgment.*

An information charging the defendant with burglary committed by entering a Southern Pacific railroad car and train with intent to commit larceny, "said car and train, at the time aforesaid, being in the prosecution of its trip, and said Solano County, at said time, being a county through which said train passed in the course of its trip," does not allege that the offense was committed in Solano County or in the State of California, and shows no jurisdiction of that county over the offense. The objection to such information may be made by a motion in arrest of judgment, although no demurrer was interposed.

Commissioners' Decision. Department 2. Appeal from Superior Court, Solano County; Hon. A. J. Buckles, Judge.

Edward Webber, convicted of burglary, appeals. Reversed.

Paul C. Harlan and O. R. Coghlan, for the appellant.

Frank R. Devlin, District Attorney, Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for the People.

SMITH, C. The defendant was convicted of the crime of burglary in the second degree, and appeals from the judgment. A motion was made in arrest of judgment on the grounds that the information fails to show that the offense charged was committed in the County of Solano (where the information was filed), or in the State of California, and that the facts alleged do not constitute a public offense. The motion was denied by the court. The propriety of this ruling is the sole question presented by the appeal.

The only allegations of the information bearing on this point are that on the day named the defendant and another "did feloniously and burglariously enter a certain car and train owned by the Southern Pacific Company (a corporation), said car and train, at the time aforesaid, being in the prosecution of its trip, and said Solano County, at said time, being a county through

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which, by reference to the information, appears to have been the felonious intent then and there, and in said car and train, to commit the crime of larceny," etc. These allegations, it is obvious, do not allege, either expressly or, by implication, that the offense charged was committed either in the County of Sclano, the place of the information,—as would ordinarily be necessary,—or, in the State of California, as required by section 783 of the Penal Code; and the information must, therefore, be held to be insufficient. *People v. Wong Wang*, 92 Cal. 281, 28 Pac. 270, and authorities there cited. The decision in *People v. Moore*, 103 Cal. 510, 37 Pac. 510, does not conflict with this conclusion. That case was decided on the ground that the information "sufficiently avers the offense to have been committed in Kern County," which said car and train passed in the course of said trip, with the case.

The contention of the prosecution that there was no demurrer, and that the objections made to the information could not be made on motion in arrest of judgment, is untenable. Pen. Code, §§ 1004, 1012. The objection to the information is "that the court has no jurisdiction of the offense charged therein" (Id. § 1004, subd. 1), and also, in effect, "that the facts stated do not constitute a public offense" (Id. § 1004, subd. 4); for it does not appear from the information that the offense was committed within the State, and, if committed elsewhere, it would not be a public offense under our laws. I advise that the judgment be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

KYLE v. COMMONWEALTH.

111 Ky. 404—23 Ky. Law Repr. 708—63 S. W. Rep. 782.

Decided June 19, 1901.

BURGLARY—INDICTMENT—PRACTICE: *Indictment fails to specify the intended felony—When a peremptory instruction or a reversal should be denied.*

1. If there is evidence on which the jury can infer guilt, a peremptory

- instruction should be denied; nor should a reversal in such case be allowed on the weight of such evidence.
2. An indictment which charges that the defendant broke and entered a dwelling house "with intent to commit a felony," but fails to specify the intended felony is bad on demurrer.
 3. The language; "with intent to commit a felony," does not state a fact; but simply expresses the pleader's conclusion.

Appeal from Circuit Court, Fayette County.

Hattie Kyle, convicted of the offense of burglary, appeals.
Reversed.

Nat. H. Hobbs and L. Grandin Grossman, for appellant.
Morrison Breckinridge, for appellee.

GUFFY, J. An indictment was returned by the grand jury of Fayette County against the appellant, which reads as follows: "The grand jury of Fayette County, in the name and by the authority of the Commonwealth of Kentucky, accuse Hattie Kyle of the crime of burglary, committed as follows, viz.: That said Hattie Kyle, on the 4th day of March, 1901, in the county aforesaid, did unlawfully, willfully, forcibly, and feloniously break into and enter the dwelling house of Ollie Fowler, in the nighttime, with the intent to commit a felony, against the peace and dignity of the Commonwealth of Kentucky." A trial resulted in a verdict and judgment holding the defendant guilty, and fixing her punishment at two years' confinement in the penitentiary, and, her motion for a new trial having been overruled, she prosecutes this appeal. The grounds relied on for a new trial are, in substance, that the court erred in overruling the defendant's demurrer to the indictment, that the court erred in refusing the instructions asked for by the defendant, that the verdict was contrary to the law and evidence introduced, and that the court erred in overruling defendant's motion for peremptory instructions.

It has been repeatedly decided by this court, both in civil and criminal cases, that, if there was any evidence from which the jury might infer that the plaintiff was entitled to recover, a peremptory instruction should not be given; and, while it is true that the evidence in this case might not be conclusive as to defendant's guilt in the estimation of this court, yet this court is not authorized to reverse a judgment in a criminal case on ac-

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count of the insufficiency of evidence if there be any evidence tending to establish the guilt of the accused.

It is insisted for appellant that the demurrer to the indictment should have been sustained. Section 124 of the Criminal Code provides that the indictment must be direct and certain as regards: First, the party charged; the offense charged; the county in which the offense was committed; and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. It will be seen from the indictment in question that the charge is breaking into the house in question with the intent to commit a felony. There is nothing to indicate what sort of felony, whether it be murder, robbery, larceny, manslaughter, or any other of the various crimes which constitute a felony. Moreover, the charge that the intent was to commit a felony is a mere conclusion of the pleader. He might consider an act a felony which in law was no offense at all. The indictment does not at all apprise the defendant of what particular charge she was to answer. It is not contended that the mere breaking into the house is a felony, unless she had the intent to commit a felony. It is said in Bishop's New Criminal Procedure (volume 2, § 142) that: "Burglary being a breaking," etc., "with the intent to commit a felony in the place, an indictment, whether upon the common law as thus defined, or upon a statute in like terms, is inadequate if it lays the intent only in those general words. It must specify the felony intended. And, if it does, it need not say that the offense meant is a felony, for that is the law known to the court. Yet the specifications need not be so minute as an indictment for its actual commission. For example, where larceny is intended, the kind, value, or ownership of the goods to be stolen need not be alleged; and, where it is rape or murder, the indictment is drawn on the like principle. Yet to state the name only—the intended felony, as larceny or rape—is by most judges deemed not sufficiently minute, though some hold it adequate." It seems from the foregoing authorities that the indictment is defective in not stating what acts the defendant intended to commit which would constitute a felony, and, failing to so state, the indictment is fatally defective, and the demurrer should have been sustained. Having reached this conclusion, it is not necessary to pass upon the correctness of the

instructions, nor as to errors complained of as to the admission of testimony. The opinion in *Slaughter v. Com.* 15 Ky. L. R. 569, 24 S. W. 622, is overruled in so far as it conflicts with this opinion.

For the reasons indicated, the judgment is reversed, and cause remanded, with directions to sustain the demurrer to the indictment, and for proceedings consistent herewith.

SMITH V. STATE.

68 Neb. 204—94 N. W. Rep. 106.

Decided March 18, 1903.

BURGLARY—INFORMATION—MOTION IN ARREST OF JUDGMENT AFTER PLEA OF GUILTY: *Motion in arrest of judgment, after a plea of guilty, to a fatally defective information.*

1. In charging the statutory crime defined by section 49 of the Criminal Code, it is essential to aver in apt terms an attempt by the accused to commit one of the felonies enumerated, by alleging the overt act or acts constituting such attempt, and, in the absence of such allegations, an information by which it is sought to charge an offense under said section is fatally defective, and will not support a sentence of imprisonment for a violation of the provisions thereof.
2. An allegation of an unlawful entering of a building with intent to commit one of the crimes enumerated in the section is not sufficient to charge a crime as therein defined.
3. A plea of guilty of the acts alleged in an information charging no offense is not a plea of guilt of the crime attempted to be charged, and the sufficiency of the information and the authority and jurisdiction of the court to pronounce sentence of imprisonment may properly be challenged by a motion in arrest of judgment.
(Syllabus by the court.)

Error to District Court, Sheridan County; Hon. James J. Harrington, Judge.

Raymond Smith, convicted of burglary brings error. Reversed.

Allen G. Fisher, for the plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown*, Deputy Attorney General, and *William B. Rose*, Assistant Attorney General for the State.

HOLCOMB, J. This is a criminal cause brought here for

review by the defendant, who stands convicted of an alleged felony, and has been sentenced to imprisonment in the penitentiary for a period of one year. The record is a peculiar one, and leaves us in some doubt with reference to the lines on which the prosecution was conducted in the trial court. The particular crime to punish which the prosecution was instituted is not made certain and entirely clear from anything appearing in the record presented for review. The legal department of the State has not favored us with a brief or oral argument in support of the judgment entered by the trial court, from which we infer that it is not prepared to defend the regularity and validity of the proceedings resulting in the imposition of the sentence of imprisonment which the defendant seeks to have reversed.

The information under which the defendant was prosecuted contains two counts, the second of which unmistakably charges burglary, but this count, during the trial of the cause, was dismissed by the county attorney. Thereupon the defendant pleaded guilty to the charge contained in the first count, and moved in arrest of judgment that the count stated no crime under any of the criminal laws of the State. The motion was overruled and sentence pronounced, and the defendant brings error, relying for a reversal principally on the ruling just mentioned.

The count of the information on which the sentence of imprisonment was imposed, omitting formal parts, charges that the defendant, on the 17th day of August, 1902, into a certain dwelling house, describing it, feloniously, burglariously, willfully, maliciously, and forcibly did break and enter, with the intent then and there, one Hannah Swanson then and there being in such dwelling house, unlawfully, purposely, and feloniously, her the said Hannah Swanson to rape, ravish, and carnally know against her will. As we interpret the record, the county attorney attempted to charge a crime under the provisions of section 49 of the Criminal Code, and this is the construction given the information by the trial court. This section provides that if any person shall willfully and maliciously, either in the day time or night season, enter any dwelling house, and shall attempt to commit any of the several felonies therein enumerated, including the crime of rape, every person so offending shall be imprisoned in the penitentiary not more than 10 years nor less than 1 year. It is evident that the information, after the dis-

missal of the second count, did not charge the crime of burglary, for it is essential, in order to charge that crime, that it be alleged the felonious breaking and entering into the building was in the night season. *In re Wm. McVey*, 50 Neb. 481, 70 N. W. 51. The information on which the conviction was had in the case at bar is wholly silent as to an allegation of time when the unlawful breaking and entering was committed.

By an inspection of section 49, it is obvious that one of the essential ingredients of the statutory crime as therein defined is an attempt by the accused to commit one of the felonies enumerated, and that, unless in apt words an allegation is inserted in the information averring an attempt to commit one of the crimes mentioned, such information would be fatally defective, and would not support a sentence of imprisonment for the commission of the crime as therein defined. The information contains no allegation showing any overt act by the defendant tending toward the commission of the crime of rape on the person named. It nowhere alleges any act or acts of the accused showing an attempt to commit the crime of rape, nor does it aver anything more than the unlawful entering into the building was with an intent to commit the act. The section declares there must be a willful and malicious entering into the building, and an attempt made to commit one of the offenses enumerated therein. These are both essential and necessary ingredients to constitute the crime. The allegation of an intent to commit the crime, unaccompanied by any averments of overt acts tending towards its accomplishment, is insufficient to meet the requirements of the statute defining the offense and the information is for that reason fatally defective, and charges no crime under said section. *State v. Colvin*, 90 N. C. 717; *State v. Harney*, 101 Mo. 470, 14 S. W. 657; *State v. Frazier*, 53 Kan. 87, 36 Pac. 58, 42 Am. St. Rep. 274; *In re John Lloyd*, 51 Kan. 501, 33 Pac. 307; *Procter v. Com.* (Ky.) 20 S. W. 213. The plea of guilty of the acts charged in the first count of the information is not a plea of guilty of the statutory crime defined by section 49 of the Criminal Code, and by a motion in arrest of judgment the defendant properly challenged the authority and jurisdiction of the court to pronounce sentence of imprisonment in the penitentiary against him as if he were guilty of the commission of such crime.

The judgment of conviction is accordingly reversed, and the cause remanded for further proceedings.

RIDGE v. STATE.

Texas—Court of Crim. App.—86 S. W. Rep. 774—22 Chi. Law J. 411.

Decided February 12, 1902.

BURGLARY: *Failure to prove non-consent of owner.*

Where the owner is a witness, the failure to prove lack of consent is fatal; circumstances will not suffice.

Appeal from the District Court of McLennan County; Hon. Samuel R. Scott, Judge.

Dorsey Ridge, convicted of burglary, appeals. Reversed.

J. E. Yantis, for the appellant.

Robert A. John, Assistant Attorney-General, for the State.

DAVIDSON, P. J. Appellant was convicted of burglary of a private residence in the daytime, and his punishment assessed at confinement in the penitentiary for a term of three years.

The alleged owner was used as a witness on the trial, and failed to testify to his non-consent to the burglary. The circumstances seem to indicate that he did not consent.

Appellant asked a charge to the effect that, before a conviction could be sustained, the want of the consent of the owner should be proved, which was refused: and the question is properly raised in the motion for new trial. The charge should have been given. Where the State has the owner of the property or occupant of the house in a case of burglary before the jury, it must be affirmatively shown that he did not consent. Resort to circumstances will not suffice. For a discussion of this question, see *Wisdom v. State* (Tex. Cr. App.) 61 S. W. 926.

The judgment is reversed, and the cause remanded,

STATE V. BRADY.

Iowa—91 N. W. Rep. 801.

Decided October 7, 1902.

BURGLARY—POSSESSION OF STOLEN PROPERTY: *Review of authorities as to whether the possession of recently stolen property is evidence of guilt on an indictment for burglary—Burden of proof—Necessity to instruct on circumstantial evidence.*

1. After reviewing authorities the court holds:
"First. That the fact of possession of goods recently stolen in connection with burglary does not in itself create a presumption or amount to *prima facie* proof that the possessor is guilty of the burglary.
"Second. That where, independent of the mere possession by the accused of the recently stolen goods, the evidence tends to show that a burglary was committed by some one, and that the theft of the goods was accomplished at the same time, and by means of such burglary, the proof of possession of the fruits of the crime will be sufficient to sustain a conviction of the felonious breaking and entering."
2. "Under the rule thus established, the instruction in the present case that the possession of the goods by the appellant 'creates the presumption that he is the party who broke and entered the building' was error."
3. Even when the burden of proof is on the accused to make out a special defense, his failure to do so does not create a conclusion of guilt as a matter of law; but the question as to guilt is to be determined by the jury upon considering all of the testimony in the case.
4. A defendant, in whose possession stolen property has been found, recently after the crime at which the property was stolen, need not show that he came by it honestly. "Wherever explanation is required, it need go no further than to show that the possession was not acquired through complicity in the particular crime of which the defendant stands charged."
5. In a case based upon circumstantial evidence, the court should instruct the jury, as to the *quantum* of proof that will justify a conviction.

Appeal from the District Court, Polk County; Hon. W. F. Conrad, Judge.

Stewart & Cohen and *A. P. Chamberlain*, for the appellant.

Charles W. Mullan, Attorney General, and *Charles A. Van Vleck*, Assistant Attorney General, for the State.

WEAVER, J. The evidence for the State tended to show that on the night of September 29, 1900, the barn of one Stuart, situated several miles east of the city of Des Moines, was un-

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lawfully broken and entered, and certain harness stolen therefrom; that on said night defendant was seen upon the public highway in that neighborhood; that about ten days thereafter the stolen property, or some of it, was found in his possession and that he made some statements or admissions serving to strengthen the suspicion of his guilt. The defendant denied his guilt, and offered considerable evidence tending to prove an *alibi*, and explained his possession of the harness by the statement that he bought it of a person who brought it to his residence in Des Moines on the morning after the alleged crime, which statement was also corroborated by several witnesses. Among the instructions given by the court to the jury are the following: "(2) The defendant is presumed to be innocent of the offense charged, and the burden is upon the prosecution to overcome this presumption, and to establish his guilt thereof beyond a reasonable doubt. No mere weight of evidence is sufficient, unless it excludes all reasonable doubt as to guilt. The proof of guilt must be inconsistent with any other rational supposition. The doubt that entitles to acquittal must be reasonable, not unreasonable; real, captious, or imaginary, not forced or artificial; but must be a doubt which, without being sought after, fairly and naturally arises in the mind after carefully considering the whole case. The proof is sufficient if it establishes guilt to a moral certainty,—such a certainty as fully and fairly convinces the understanding of the jurors." "(8) So, too, the possession of property that has been recently stolen from a building by means of breaking and entering said building is sufficient to raise a presumption of guilt of the person in whose possession said property is found; that is, it creates the presumption that he is the party that broke and entered said building, and took therefrom the said property, unless the attending circumstances or evidence explains said possession, and shows that the same may have been otherwise honestly acquired. If, therefore, in this case, you find that the building in controversy was in fact broken into substantially as alleged in the indictment, and that there was therein at the time harness and other property, which was kept there for use, deposit, or safe-keeping, and that said property, or some of it, was at the same time alleged stolen and carried away from said building, and shortly thereafter the same, or some of it, was found in the possession of

defendant, the said possession would raise a presumption of guilt of the defendant as to matters and things charged in the indictment, unless the attending circumstances or other evidence overcome the presumption that is hereby raised as to create a reasonable doubt of the defendant's guilt. In deciding the weight to be given to such presumption, you will take into consideration the time which has elapsed between the taking of the goods and the finding of them in the possession of the defendant, if you find they were so found in his possession; the place from where the goods were taken, and the distance therefrom to the place where said goods were found in his possession, if you find they were so found; the kind of property; whether easily transferable or not; what, if anything, was said at the time by the defendant, and what, if any explanation, he made in regard to his possession of said property, and all other evidence tending to explain said possession; and all other facts and circumstances proved fairly tending to show whether the defendant came into possession of said property fairly and honestly." The defendant asked the court to supplement its charge as given to the jury with certain other instructions, of which we will here quote the following: "First. You are further instructed that, where the State seeks a conviction upon circumstantial evidence alone, it must not only show that the alleged facts and circumstances are true, but that they are absolutely incompatible with any reasonable hypothesis of the innocence of the accused." "Third. You are further instructed that, even if you should find from the evidence that the defendant had in his possession property that had been taken from the building as described in the indictment, a short time after it was taken, that fact does not raise a presumption of law that the defendant is guilty of the crime of breaking as charged in the indictment, or shift the burden of proof upon the defendant to satisfactorily explain his possession of the property. Unless you find from the evidence that the State has proven to a moral certainty and beyond a reasonable doubt that the defendant did break and enter the building for the purpose of committing a public offense, as charged in the indictment, your verdict must not be guilty." "Fifth. You are further instructed that, if the evidence in this case raises a reasonable doubt in your minds whether or not the defendant received these harness from some other person, no matter if he

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did get them on Sunday, or even if he had reason to believe the harness had been stolen by the man from whom he got them from; and if the evidence does raise in your minds a reasonable doubt that he received these harness from some other person,—then it is your duty to acquit.” “Sixth. You are further instructed that the words ‘honestly acquired,’ as used in these instructions, mean nothing more than that the defendant obtained these harness otherwise than breaking and entering, as charged in the indictment.”

Aside from the question of the sufficiency of the evidence, which we will not discuss further than to say we would not be inclined to disturb the verdict on this ground alone, it will be observed from the foregoing statement that the principal points for our consideration have reference to the legal effect of the possession of goods stolen by burglarious means, and the sufficiency of circumstantial evidence in the proof of crime.

1. As to the effect to be given in prosecutions for burglary to proof of possession of goods stolen in connection with the breaking and entering, the authorities are not entirely in harmony. There are decisions which hold without qualification that the fact of possession of property recently stolen, under such circumstances has no tendency to prove the possessor's guilt of the burglary. *People v. Gordon*, 40 Mich. 716. And, on the other hand, there seem to be cases which hold that such fact alone creates a sufficient presumption of guilt to justify conviction of the accused. *Knickerbocker v. People*, 43 N. Y. 177. The rule, however, which is recognized by the great weight of authority, and most commends itself to our sense of reason and justice, adopts neither of the extremes mentioned, and may be stated as follows: There is no presumption of guilt of burglary attaching to the mere possession of the stolen goods by the accused, but such fact, if the alleged crime be of recent occurrence, has a tendency to prove his guilt, and, if there be other proved circumstances tending to connect him with the commission of the offense, the fact of possession, thus aided, will sustain a conviction. Reviewing an instruction quite like the one now under consideration, the Supreme Court of Kansas says: “Assuming, however, that a presumption of guilt arises, in case of larceny, from the possession of goods recently stolen, we do not feel warranted in still further extending the presumption that the evi-

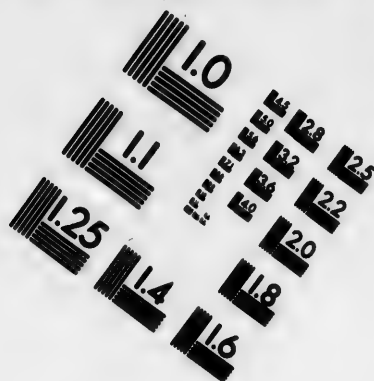
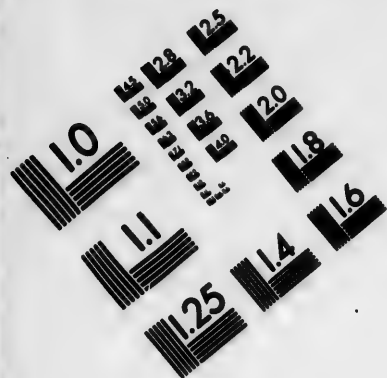
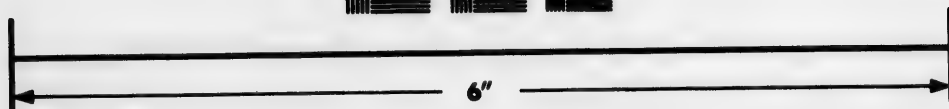
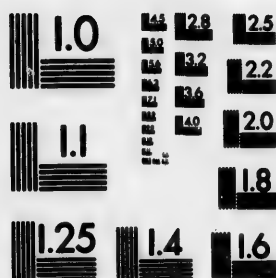


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dence is of itself sufficient, if unexplained, to warrant a conviction for burglary. * * * The possession of stolen goods taken on the occasion of a burglary is evidence tending to establish the guilt of the possessor, and may, when taken in connection with other criminating circumstances, raise a presumption of guilt sufficient to warrant a conviction; but the mere possession, without any other facts indicative of guilt, is not *prima facie* evidence that such person committed burglary." *State v. Powell*, 58 Pac. 968. Substantially the same rule is announced in *Methard v. State*, 19 Ohio St. 368, where the court cites the following passage from Best on presumptions: "There can be nothing more persuasive than the circumstance of possession commonly is when corroborated by other criminative circumstances; nothing more inconclusive supposing it to stand alone." See, to the same effect: *People v. Fagin* (Cal.) 6 Pac. 394; *Same v. Hannon*, 85 Cal. 374, 24 Pac. 706; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Davis v. People*, 1 Parker, Cr. R. 447; *State v. Conway*, 56 Kan. 682, 44 Pac. 627; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *State v. Graves*, 72 N. C. 482; *State v. Hodge*, 50 N. H. 510; *Taliaferro v. Com.*, 77 Va. 411; *Falvey v. State*, 85 Ga. 157, 11 S. E. 607; *Stuart v. People*, 42 Mich. 255, 3 N. W. 863; *Brooks v. State*, 96 Ga. 353, 23 S. E. 413; 1 McClain, Cr. Law, § 514.

Our own cases are in some apparent confusion on this point, but a careful review of the several holdings indicates that we are fairly committed to the rule last above cited, and in harmony with the general trend of the decisions. Taking the principal cases bearing upon the proposition in their chronological order, we find that in *State v. Reid*, 20 Iowa, 413, this court approved an instruction to the effect that the mere possession of goods recently stolen in connection with a burglary does not make a *prima facie* case of guilt against the possessor when on trial for the breaking and entering, but, if there is other evidence of an incriminating character, then such possession, with the corroborating circumstances, will sustain a conviction. *State v. Golden*, 49 Iowa, 48, is relied upon by the State, and has sometimes been cited as holding to the doctrine that the mere possession of the stolen goods is sufficient to convict the possessor of a burglary committed in connection with such theft; but an examination of the opinion does not justify such conclusion.

It is true that we there upheld the trial court in refusing to give an instruction negating such proposition, and approved an instruction as follows: "If parties are found in possession of goods recently stolen by breaking into a storeroom, and which have been stolen by breaking into a storeroom, it causes a presumption that such parties have stolen such goods by breaking into a storeroom. The presumption of guilt may be rebutted by defendant's explaining such possession. The burden is on the State to prove, and it must prove, that such goods were stolen from a storeroom, before such presumption exists." This instruction is by no means clear, but, as will be indicated by the following extract from the opinion, we interpreted it as not inconsistent with the instruction approved in the *Reid Case*. We said: "It is the established rule in this State that possession of stolen property immediately after the larceny tends to prove the party in possession to be guilty of the larceny. We are not called to consider and determine the value or persuasive power of such evidence. This is the province of the jury. Nor are we called in the present case to determine whether it alone is sufficient to convict, because it is practically conceded, and certainly cannot be successfully denied, that there was independent evidence of the breaking. This evidence, together with the recent possession, and a failure to satisfactorily account for such possession, would be sufficient to authorize a jury to convict." With this rendering of the meaning of the instruction, whatever we may think of the line of reasoning by which the interpretation was developed, the decision is not inconsistent with the rule we have stated. In *State v. Shaffer*, 59 Iowa, 290, 13 N. W. 306, we for the first time had occasion to pass upon the question of the effect, in a prosecution for burglary, of the possession of the stolen goods, without reference to other evidence upon which a verdict of guilty might be sustained. The trial court there charged the jury as follows: "And if the barn was closed up for the night, so that it could not be entered without breaking, and it was so closed at nine o'clock at night, and at about twelve o'clock of the same night some of the goods kept in said barn during this time were found in the possession of the defendant, or of the defendant and others, this would be *prima facie* evidence that the defendant broke and entered said building; and this alone, in the absence of other evidence, and the

possession, not explained, showing it to be an innocent possession, would be sufficient to warrant a conviction of the crime charged." Of this instruction the opinion says: "We think the presumption which arises from the possession of goods recently stolen is applicable to the crime of larceny, but not the crime of burglary. The most that can be said of it is that it is evidence tending to show that the defendant committed burglary. It surely was competent evidence bearing upon the guilt of the defendant, but that it was of itself sufficient, if unexplained, to warrant a conviction, appears to be without the support of authority, but directly contrary thereto." This clear and unequivocal decision upon the very point now under consideration has never been withdrawn or overruled. In *State v. Tilton*, 63 Iowa, 117, 18 N. W. 716, the precise question was again passed upon, and the rule stated in the *Shaffer Case* expressly approved and followed. The case of *State v. Rivers*, 68 Iowa, 616, 27 N. W. 781, presents the question in somewhat different form. The trial court there instructed the jury, in effect, that, if they found that at the time and place charged in the indictment certain goods were stolen from the building by breaking and entering such building, and that soon thereafter the goods were found in the possession of the accused, they "would be warranted in concluding that the goods had been stolen by him by breaking and entering." This, it will be seen, falls far short of saying that the naked fact of the unexplained possession of the stolen goods raises a presumption of the possessor's guilt of the burglary. In approving this instruction we said: "The general doctrine undoubtedly is that the possession of property which has been stolen from a building which had been broken and entered is not alone *prima facie* evidence that the one having it in possession is guilty of burglary. See the authorities cited in *State v. Shaffer*. Such possession, if unexplained, does raise a presumption that the party is guilty of larceny, but it does not follow, necessarily, in every case, that both crimes were committed by the same party. The one who committed the larceny may have found the building open after the burglary was committed, and may have entered, and stolen the goods, without having been concerned in the breaking. It is obvious, therefore, that the mere possession of the stolen goods does not have the same tendency to connect him with the burglary which it does with

the larceny." While thus reaffirming *State v. Shaffer*, it was held that, in view of the language of the instruction requiring the jury to first find that the burglary and theft were committed at one and the same time, and by the same person or persons, before drawing the unfavorable inference from the possession of the goods, there was no error. Upon the strength of this precedent a similar instruction was approved in *State v. Frahm*, 73 Iowa, 355, 35 N. W. 451. In *State v. Yohe*, 87 Iowa, 33, 53 N. W. 1088, the instruction objected to was of like import, but the only objection made to it was that the jury were thereby given to understand that, if they found the defendant had committed the larceny, they should convict him of burglary as charged, and it was held that the instruction could not fairly be so construed. In *State v. Jennings*, 79 Iowa, 516, 44 N. W. 799, we had occasion to review to some extent the *Cases of Shaffer and Rivers*, and held that, properly construed, they were not in conflict, and we there say that the instruction in the latter case is distinguishable, in "that it does not attach a legal effect to the fact of possession, but leaves the jury with discretion. While the jury would be warranted in finding the fact of breaking from the possession, having in view the particular facts and surroundings of such possession, it is not required so to do. No definite presumption follows the possession as a matter of law, and the burden is not necessarily shifted to explain the possession."

All our later decisions in which there is any attempt to consider this question are expressly based upon the cases we have already referred to, and none of them profess to extend the doctrines therein laid down. *State v. Ryan*, 113 Iowa, 539, 85 N. W. 812; *Same v. Ham*, 98 Iowa, 61, 66 N. W. 1038; *Same v. La Grange*, 94 Iowa, 60, 62 N. W. 664; *Same v. Marshall*, 105 Iowa, 38, 74 N. W. 763. Taking our decisions together, then, it may be said to be established in this State: First. That the fact of possession of goods recently stolen in connection with burglary does not in itself create a presumption or amount to *prima facie* proof that the possessor is guilty of the burglary. Second. That where, independent of the mere possession by the accused of the recently stolen goods, the evidence tends to show that a burglary was committed by some one, and that the theft of the goods was accomplished at the same time, and by

means of such burglary, the proof of possession of the fruits of the crime will be sufficient to sustain a conviction of the felonious breaking and entering. This distinction is recognized also in *Smith v. People*, 115 Ill. 17, 3 N. E. 733; *Langford v. Same*, 134 Ill. 444, 25 N. E. 1009; *Magee v. Same*, 139 Ill. 138, 28 N. E. 1077; *Pecple v. Wood*, 99 Mich. 620, 58 N. W. 638. Under the rule thus established, the instruction in the present case that the possession of the goods by the appellant "creates the presumption that he is the party who broke and entered the building" was error. The use of the terms "presumption of guilt" and "*prima facie* evidence of guilt" with reference to the possession of stolen goods has perhaps been too long indulged in by courts and text-writers to be condemned, but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. In a civil proceeding, when a plaintiff makes a *prima facie* case, the burden is shifted, and, in the absence of any countershowing, he is entitled to recover as a matter of law. This rule is understood by the average intelligent layman as well as by those learned in the law, and when, in a criminal case, an instruction is given that the showing of a specific fact is *prima facie* evidence of guilt, jurors may very naturally conclude that the establishment of such fact has the effect to cast upon defendant the burden of proving his innocence of the charge against him. And yet it is a fundamental principle of the criminal law that no amount of evidence can serve to shift the burden of proof from the State to the defendant. *Ogletree v. State*, 28 Ala. 693; *U. S. v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *Same v. Wright* (C. C.) 16 Fed. 112; *State v. Flye*, 26 Me. 312; *Com. v. Kimball*, 41 Mass. 366; *Ball v. Com.*, 81 Ky. 662. It is true that, as relates to some specific defenses,—for instance, insanity or alibi,—the defendant assumes the burden of establishing the same before he can be entitled to an acquittal on such ground alone; but even though he totally fails in making out such defense, the conclusion of guilt does not follow as a matter of law, but remains for the determination of the jury upon all the evidence produced upon the trial. "Presumptions" of guilt and "*prima facie*" cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offense with

which he is charged (*Smith v. State*, 58 Ind. 340, *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Com. v. Randall*, 119 Mass. 107; *Smith v. People*, 103 Ill. 82; *Branson v. Com.* 92 Ky. 330, 17 S. W. 1019; 1 McClain, Cr. Law, § 617); and, if those terms are to be used in charging the jury, they should be properly defined and guarded to avoid prejudice.

2. It is further said that the eighth instruction is also defective in requiring the defendant to show that he obtained possession of the stolen goods "fairly and honestly," before he can be relieved from the inference of guilt attached to the possession. We think the instruction is not to be approved, though possibly, if the record were otherwise without error, we should not feel justified in ordering a new trial on that ground alone. The language to which the objection is made may be found in many instructions which have been approved by this and other courts; but in each instance, so far as we have observed, the approval has been based upon other grounds, and this particular phrase, "honestly acquired," or its equivalent, has passed simply because it seems to have been unchallenged. But it cannot be true that a person in possession of stolen goods is bound to show that he obtained them "honestly" or "fairly." He may have received them knowing them to be stolen; he may have stolen them from the building after the breaking had been accomplished by another without his aid or collusion; he may have stolen them from the burglar or thief after the larceny from the building had been accomplished by the latter, or in any of numerous ways which bear the taint of dishonesty and crime; and yet possession so obtained would have no tendency to show his guilt of the particular crime charged in the indictment. *Cornwell v. State* (Ga.) 18 S. E. 154; *Falvey v. Same* (Ga.) 11 S. E. 607. While not identical in form and substance, the language under consideration is not altogether unlike the instruction sometimes given that the defendant is required to "satisfactorily" explain his possession of the goods,—a proposition which has frequently been condemned. See *State v. Brundage* (decided at the present term)—N. W.—, and the authorities there cited. Wherever explanation is required, it need go no further than to show that the possession was not acquired through complicity in the particular crime of which the defendant stands accused.

3. It follows from what is said in the preceding paragraphs

of this opinion that the fifth and sixth instructions asked by the defendant, or something equivalent thereto, should have been given to the jury. We think, too, the defendant was entitled to have his theory of the possession of the goods specifically called to the attention of the jury with instructions that, if such claim was found to be true, or if proof thereof was such as to raise a reasonable doubt in the minds of the jurors, he was entitled to an acquittal. There was also a failure to give any proper definition of circumstantial evidence, or of the rule governing its effect. The only reference thereto, if any, is in the second instruction, in the single sentence, "The proof of guilt must be inconsistent with any other rational supposition." This is a very inadequate statement of the well-known principle. In submitting a case in which the question of guilt depends entirely upon circumstantial evidence, the jury should not be given loose rein, but should have careful direction as to the *quantum* of proof which will justify a conviction. *State v. Johnson*, 19 Iowa, 230; *People v. Cunningham*, 6 Parker, Cr. R. 398; *Dreessen v. State*, 38 Neb. 375, 56 N. W. 1024.

Other questions are argued, but, so far as not covered by the conclusions already announced, they are not likely to arise upon a retrial, and we will therefore not pass upon them.

For the reasons stated, the judgment of the district court must be reversed, and cause remanded for a new trial. **Reversed.**

STATE V. SWIFT.

120 Iowa 8—04 N. W. Rep. 269.

Decided April 9, 1903.

BURGLARY: *Possession of stolen property—Review of evidence and instructions—Instruction as to honest possession.*

1. "Where it appears that certain goods have been stolen from a building by breaking and entering, the proof of the subsequent possession, without reasonable explanation that the goods were obtained otherwise than in the commission of the crime of breaking and entering, will support a conviction for the latter crime." (Quotation from the opinion.)
2. Review of facts and circumstances and their bearing on instructions given.
3. Under the evidence, it was not error to instruct the jury that such

possession if unexplained, was sufficient to warrant the conclusion that the possessor broke and entered the building; "unless the evidence showing such possession leaves a reasonable doubt whether such person may not have come honestly into the possession;" although the use of the expression "honestly" is an unfortunate one and in some cases might be misleading and prejudicial.

Appeal from District Court, Pottawattamie County; Hon. A.

B. Thornell, Judge.

Conviction for breaking into building. Affirmed.

Roscoe C. Barton and *A. L. Preston*, for appellant.

Charles W. Mullan, Attorney General, and *Charles A. Van Vleck*, Assistant Attorney General, for the State.

MCCLAINE, J. The contention for the defendant is that he was convicted on evidence that a keg of beer taken from the warehouse in question was found in his possession soon after the building was broken and entered, and complaint is made of the instructions as to the effect which the jury might give to such evidence. This question has frequently been before the court, and in the recent case of *State v. Brundidge*, 118 Iowa. 92. 91 N. W. 920, the previous decisions are referred to. It is not necessary, therefore, to again cite and discuss the previous holdings of this court as to the effect of evidence of recent possession of stolen property as tending to establish the guilt of the person having such possession, when placed on trial for the crime of burglary, committed as a part of the same transaction in which the property is charged to have been stolen. It is sufficient to say that the court is unequivocally committed to the position that, where it appears that certain goods have been stolen from a building by breaking and entering, the proof of the subsequent possession, without reasonable explanation that the goods were obtained otherwise than in the commission of the crime of breaking and entering, will support a conviction for the latter crime. In some of the cases which we have heretofore considered, objection has been taken to the use in such connection of language indicating that proof of subsequent possession gives rise to the presumption of guilt, which it is for the defendant to overcome; but such an objection is not tenable to the instructions given in this case, by which the jury were told that "the fact of such possession, if unexplained, is sufficient to warrant the conclusion that the person having such possession is the

person who broke and entered the building," unless the evidence showing such possession leaves a reasonable doubt whether the defendant may not have come into possession of the goods otherwise than by breaking and entering. In some of the cases, also, the objection has been made that the instruction did not limit the effect of subsequent possession to a case where it was shown that the goods were obtained by means of the breaking and entering with which the defendant is charged. But here, again, the instructions are free from any possible complaint. They relate to a case where "property stolen from a building by breaking and entering such building is, soon after the larceny, found in the possession of such person." We cannot discover that the instructions in the case before us are open to any of the objections which have been raised in other cases of like character coming before us for consideration.

It is further urged, however, that, even if the instructions were correct, there was no evidence to sustain a conclusion on the part of the jury that the keg of beer found in defendant's possession had been obtained from the building in question by breaking and entering. It is certainly not necessary that the State be able to produce witnesses who actually saw the goods taken at the very time the breaking and entering was committed. Circumstantial evidence may establish this fact as well as any other fact in the case. When the jury are told that this essential fact must be found from the evidence, and they do find that the circumstances are inconsistent with any other rational hypothesis than that the building was broken and entered with the intent to steal the goods, and that such goods were stolen by breaking and entering, we see no reason why a conviction of the defendant should not be sustained, if there are circumstances which can reasonably be considered as supporting such a conclusion. That there are such circumstances in this case is beyond question. The whole story of defendant and the person who was jointly indicted with him for the same crime—that they met a tall, slim man and a short, thick man, who, although entire strangers to them, invited them to go and participate in the drinking of a keg of beer, and produced a keg of beer from a place near where the warehouse which was broken and entered was situated, and after carrying the keg to a suitable place, and enjoying a small portion, only, of the contents of the keg, left it with the

defendant and his accomplice to finish—is too preposterous to be entitled to credence; and the fact that such a story was told, ingeniously, as it seems, to fit into the necessities of the case, might well be considered by the jury as pointing to no other conclusion than that the keg of beer which was found in the possession of defendant and his accomplice had been stolen from the warehouse by breaking and entering.

Error is assigned in the giving of the instruction relating to the subsequent possession of the stolen goods, in that the jury were told that the fact of such possession, if unexplained, was sufficient to warrant the conclusion that the person having such possession was the person who broke and entered the building, "unless the evidence showing such possession leaves a reasonable doubt whether such person may not have come honestly into such possession;" the objection being to the word "honestly." If there were anything in the evidence to indicate that this word could possibly have reference to the obtaining of the beer in any other dishonest way than by breaking and entering, there would be some force in the objection. But it is perfectly clear that it has reference to the question whether the beer was obtained by breaking and entering, or not, and the jury could not have been misled. We are constrained to say, however, that the expression is an unfortunate one, and, under some circumstances, might be misleading and prejudicial. But in the present case there was no possibility of any misconception, and we hold that while the use of the word "honestly" in such connection is not to be commended, and may sometimes constitute prejudicial error, it was not prejudicial error in this case.

The other assignments of error argued by counsel for defendant do not require separate or extended discussion. There was an instruction relating to the evidence as to an *alibi*, which was correct, as far as it went, and was sufficient to guide the jury in the consideration of such evidence. No further instruction on that question having been asked, there was no error committed in that respect. The rulings on the admission of evidence which are complained of were right, and, on the whole record, we are satisfied that the judgment of the trial court should be sustained.

Affirmed.

STATE V. BRUNDIDGE.

118 Iowa 92—91 N. W. Rep. 920.

Decided October 17, 1902.

BURGLARY: *Possession of stolen property not prima facie proof of breaking and entering, or, of guilt—Rule as to explanations of such possession—Examination of witnesses—Instructions—Prejudicial testimony not cured by subsequent exclusion—Partial exclusion of prejudicial testimony.*

1. Over the defendant's objection it was proved that upon a search of defendant's home and the finding of a pail of tobacco in question, there was also found, in a private drawer of the defendant's, a box of patent medicine, and, a box of candy. These latter articles not being connected with the crime in question; but manifestly introduced in evidence to strengthen the unfavorable inference arising from the finding of the tobacco. Subsequently the court withdrew from the jury the evidence of the patent medicine; but made no mention of that of the candy. Held: 1. That the admission of the testimony was error. 2. That the withdrawal should have been as broad as the introduction. 3. That while a subsequent exclusion of incompetent testimony generally cures the error, it is "a rule which may easily be abused in the trial of a criminal case"—and should not be extended beyond established precedents.
2. A lady, or girl, testified for the State, that before the stolen tobacco was found at the defendant's home, he was there seen in possession of a small package of tobacco similar to those in the pail afterwards found at his home. On behalf of the State an objection was sustained to the following question, asked of the defendant as a witness: If you did have a chew of Sterling tobacco in her presence within two or three days before the officers got this pail of tobacco at your home, where did you get this tobacco? Held that the defendant had a right to explain where he got the tobacco; also, that as the defendant was not likely to have remembered that he took a chew of tobacco in the witness' presence, the question was not objectionable as being argumentative or hypothetical.
3. Defendant, and one Blanchard, jointly occupied the house where the tobacco was found. Blanchard's wife was a witness for the defendant. Held, that it did not call for a conclusion to ask her the following question: "Who occupied the upstairs of that house?"
4. The defendant being charged with breaking and entering a car and not with larceny, such distinction, not easily recognized by jurors, should be kept before the jury by instructions, and, it was error to simply instruct the jury as to the law regarding the possession of stolen property, as applicable to larceny cases.
5. The possession of goods feloniously taken from a railway car is not *prima facie* proof of breaking and entering.

6. Possession of recently stolen goods, is not *prima facie* evidence of guilt; nor, is the defendant required to satisfactorily explain the possession in order to avoid a conclusion of guilt. The most that can be required, is that his explanation raises a reasonable doubt in his behalf.

Appeal from District Court, Blackhawk County; Hon. Franklin C. Platt, Judge.

Oliver Brundidge was convicted of breaking and entering a railroad car with intent to commit larceny. He appealed. Reversed.

H. H. Bezold and Courtright & Arbuckle, for appellant.

C. W. Mullan, Attorney General, and *Charles A. Van Vleck*, Assistant Attorney General, for the State.

WEAVER, J. The testimony tended to show that on the night of May 8, 1900, a pail of "Sterling tobacco" was stolen from a freight car on the Illinois Central Railroad while in course of shipment from Dubuque to Claire, Iowa; that the car in which the tobacco was being carried was properly sealed at Waterloo, but on reaching Austinville, in Butler County, was found to have been broken open; that on reaching Ackley, in Hardin County, the contents of the car were checked over, and a pail of Sterling tobacco discovered to be missing; that on May 14th the pail of tobacco was found upstairs in a house occupied jointly by defendant and one Blanchard in the city of Waterloo; that, before this discovery, defendant was seen to use tobacco of the same kind or description as that which was stolen.

1. Among the witnesses called by the State was one Welch, a detective in the employ of the railroad company. Welch, having been present at the time the sheriff searched the defendant's house and found the tobacco, testified that there was found in a private drawer belonging to defendant (not with the tobacco) two boxes,—one of patent medicine, and the other of candy. This evidence was admitted over the objection of the defendant, but no effort was made by the State to connect the possession of these goods in any manner with the theft of the tobacco, or the breaking of the car. At the close of the trial, the court withdrew from the consideration of the jury the testimony as to the "patent medicine and salted peanuts," but made no mention of the testimony relating to the candy. It is true, there was no evidence that the goods referred to were stolen, but it is perfect-

ly clear that the testimony was offered for the purpose of having the jury infer that such was their character, and thereby strengthen the unfavorable inference arising from the presence of the tobacco in defendant's house. The incompetency, not to say unfairness, of such testimony, is too manifest for argument, and the withdrawal thereof should be as broad as the original statement. It is true, also, as contended by the State, we have recognized the rule that, where incompetent evidence has been received, its subsequent withdrawal or exclusion by the court will ordinarily cure the error. It is, however, a rule which may easily be abused,—especially in the trial of a criminal case,—and we are not disposed to extend it beyond the precedents already established. In our judgment, there was prejudicial error in the admission of the testimony referred to.

2. A witness (Mora Colvin) testified for the State that in the month of May she was at the defendant's house, and saw him take from his pocket a small package of tobacco, resembling the packages with which the stolen pail was filled. The defendant, being thereafter a witness in his own behalf, was asked, in reference to the time mentioned by Miss Colvin: "If you did have a chew of Sterling tobacco in her presence within two or three days before the officers got this pail of tobacco at your home, where did you get this tobacco?" The State's objection that this question was "incompetent, irrelevant, immaterial, and argumentative," was sustained. We think the question should have been allowed. It was defendant's theory that, while he did have in his possession about that time a small quantity of Sterling tobacco, he obtained the same from a man in Waterloo, and there was some corroboration of his statement in that respect. It was competent, of course, for the State to show the use of Sterling tobacco by the defendant after the alleged crime was committed, as having some tendency to connect him with the commission of the offense; and, on the other hand, it was the right of defendant, if the tobacco seen in his hand by Miss Colvin was of that brand, to explain to the jury where he got it. It is not open to objection that the question is merely hypothetical or argumentative. It could scarcely be possible for the defendant to recall the circumstance of having taken a chew of a particular brand of tobacco in his own kitchen in the presence of the witness, and yet he may be able to say where he pro-

cured the article if it was in fact seen in his possession. In view of the other testimony admitted, tending, to some extent, to neutralize the prejudice arising from the ruling now under consideration, we should not be inclined to reverse the judgment below on this ground alone, and mention it here that the error may be avoided on a retrial.

3. As already stated, the defendant occupied the house where he lived, and where the tobacco was found, jointly with one Blanchard. The wife of Blanchard, being a witness for defendant, was asked (referring to the room where the tobacco was found), "Who occupied the upstairs of that house?" and the answer was excluded on the objection of the State that the question called for a conclusion. The objection should have been overruled. While the answer called for is in some sense a conclusion, it is one of those conclusions which so far partake of the nature of fact as to be admissible in evidence. To hold such evidence incompetent would "limit and hamper the introduction of evidence in a manner not contemplated by any rule of law of which we have any knowledge." *Yahn v. City of Ottumwa*, 60 Iowa, 432, 15 N. W. 257; Abbott Trial Evidence (2d Ed.) 408. It was of importance to the defendant to show who in fact occupied the room in question. The State relied upon the finding of the tobacco there as the main support of its case, and if the defendant did not himself occupy it, or if such occupancy was shared with others, that fact would tend very materially to weaken the unfavorable inference against him.

4. Exception is taken to several paragraphs of the court's charge to the jury, but we will confine our attention to the twelfth, which is as follows: "(12) The jury are instructed that when property which has been recently stolen, and is shortly afterwards found in the exclusive possession of a party, such fact is *prima facie* evidence of the guilt of such party so found in possession, of the felonious taking of such property, unless such possession is satisfactorily explained. Therefore if you find from the evidence, beyond a reasonable doubt, that on or about May 14, 1900, the defendant, Oliver Brundidge, was in the exclusive possession of the pail of tobacco, or part thereof, introduced in evidence, and that such pail of tobacco was one that had been taken from the freight car in question, you would be warranted in finding that the defendant feloniously took and

stole the same, unless the evidence before you satisfactorily explains the possession of the defendant." This instruction seems to overlook the fact that defendant is not here charged with stealing the tobacco, but with feloniously breaking and entering a railway car, and the attention of the jury is directed only to the circumstances under which they will be justified in finding, "that defendant feloniously took and stole the property." The distinction here ignored is one which jurors very easily fail to recognize in cases of this kind, when not guided by clear and apt instructions, and for that reason care should be taken to avoid any confusion of ideas as to the real issue to be determined. *State v. Tucker*, 76 Iowa, 232, 40 N. W. 725. Passing that feature of the instruction, it must be said that the rule stated by the trial court casts upon the defendant a heavier burden than the law, as approved by this court, will justify. The jury were told, in effect, that possession of the stolen goods was *prima facie* evidence of defendant's guilt, and, if such possession was established, they could upon that fact alone return a verdict of guilty, unless some satisfactory explanation was made. In the first place, whatever may be said as to the effect of possession of stolen goods upon a trial for larceny, it is not of itself *prima facie* evidence of guilt of breaking and entering to commit larceny. *State v. Brady* (decided at the present term) 91 N. W. 801; *State v. Shaffer*, 59 Iowa, 290, 13 N. W. 306; *State v. Jennings*, 79 Iowa, 516, 44 N. W. 799; *State v. Tucker*, *supra*. It must not be understood from this statement of the law that such possession is not competent evidence from which, in view of all the circumstances, the jury may find or infer guilt, but the rule we have adopted is that such fact does not in itself make a *prima facie* case for the State. Nor is the accused, even in cases of larceny, required to "satisfactorily explain" his possession of stolen goods, in order to avoid the conclusion of guilt. The most that can be required of him in such cases is that the circumstances be such as to raise a reasonable doubt whether the possession has been acquired otherwise than by the crime charged, and, that being done, he will be entitled to an acquittal, even though the explanation be not entirely satisfactory. *State v. Manley*, 74 Iowa, 561, 38 N. W. 415; *State v. Kirkpatrick*, 72 Iowa, 500, 34 N. W. 301; *State v. Richart*, 57 Iowa, 245, 10 N. W. 657; *State v. Emerson*, 48 Iowa, 172; *State v. Peterson*, 67 Iowa.

564, 25 N. W. 780; 1 McClain, Criminal Law, § 617. Referring to a somewhat similar instruction, in the *Manley Case*, we said: "Under it the jury were warranted in convicting the defendant on proof of the fact that he had the stolen property in his possession, unless he established to their satisfaction that he did not steal it. But that is not the rule. The defendant was entitled to an acquittal unless the jury could say, upon a consideration of all the evidence, that they entertained no reasonable doubt of his guilt. But a reasonable doubt may be engendered by evidence which does not satisfactorily establish the fact sought to be proven. If the evidence was sufficient to raise a reasonable doubt whether defendant received the property under the circumstances claimed by him, it necessarily raises such doubt as to his guilt, in so far as that question rests alone upon the fact of his possession." The announcement of the more stringent rule by the trial court could not have been otherwise than prejudicial to the defense,—a fact which will readily be apparent when we note that, aside from the finding of the tobacco in defendant's house, the case made by the State was wholly insufficient to sustain a verdict.

5. Appellant urges also that the court should have directed a verdict of not guilty on account of the insufficiency of the evidence. We must say that the case made by the State is by no means a strong one, but in view of the fact that the judgment must be reversed for the errors already pointed out, and the possibility that upon a retrial other evidence may be offered, we will not pass upon the point thus raised.

For the reasons stated, it is ordered that the judgment below be reversed, and the cause remanded for a new trial.—Reversed.

GRAVITT v. STATE.

114 Ga. 841—40 S. E. Rep. 1003.

Decided March 11, 1902.

BURGLARY: *Possession of stolen goods.*

1. In the trial of an indictment for burglary, where a breaking and larceny have been shown, recent possession of the stolen property by the accused, where such possession is not satisfactorily explained, is a circumstance sufficient to authorize the jury to find that the accused

is guilty as charged; but it does not create a presumption of law against the accused, and is not, of itself, necessarily proof of his guilt.

2. A conviction of burglary is not sustained by evidence which, taken most strongly against the accused, would only lead to the conclusion that he has been guilty of receiving stolen goods.

(Syllabus by the court.)

Error to Superior Court, Hall County; Hon. J. B. Estes, Judge.

Bige Gravitt, convicted of burglary, brings error. Reversed.

H. H. Dean, for plaintiff in error.

W. A. Charters, Solicitor General, for the State.

LEWIS, J. The accused was tried in the Superior Court of Hall County upon an indictment charging him with burglary, and was convicted. He made a motion for a new trial, which was overruled, and he excepted.

1. The court charged the jury, in effect, that, where a breaking and larceny have been shown, recent possession of the stolen property by one accused of the burglary, not explained to the satisfaction of the jury, would be proof of his guilt; that while possession satisfactorily explained would create no presumption against the accused, "if he fails to account for it to the satisfaction of the jury, the law presumes he is the guilty party." This charge states too broadly the rule applicable to recent possession of stolen property, and was error manifestly prejudicial to the accused. It is true, as has been repeatedly ruled by this court, that such possession, unexplained, or not satisfactorily explained, is a very strong circumstance, upon which the jury will be authorized to infer the guilt of the accused. But to charge that this circumstance creates a presumption of law that the one so found in possession of stolen property is guilty of the theft thereof, and is of itself proof of guilt, is to compel the jury to do that which they are merely permitted by law to do. The presumption is one of fact, and not of law. There is nothing in what is here laid down which conflicts with the case of *Jones v. State*, 105 Ga. 650. 31 S. E. 575, for while it is there stated, as a general rule, that the recent, absolute, and unexplained possession of stolen goods raises a presumption of the guilt of the person having such possession, the greatest length to which the rule is carried is that it is sufficient to warrant the

conviction of the accused; and at another point in the opinion the following language is used: "It is true that the possession of goods stolen at the time of the commission of a burglary is but a circumstance. If it is recent, it is, when unexplained, a very strong circumstance, tending to show the guilt of the possessor, and it is sufficient to put the burden of explaining the possession on the person charged with the offense."

In *Lester v. State*, 106 Ga. 372, 32 S. E. 335, the rule is stated in the following language: "If one be found in the recent possession of goods shown to have been stolen from the house at the time of the breaking and entering, such possession is sufficient to connect the person in possession with the perpetration of the offense. But it is not of itself conclusive." See, also, *Turner v. State*, 114 Ga. 425, 39 S. E. 863.

2. It appears that another person than the accused, one Cruse, has been convicted of the same burglary as that with which Gravitt was charged. There is nothing in the evidence to connect Gravitt with the breaking and entering of the store of the prosecutor, as charged in the indictment, either as principal or as an accessory of Cruse. Viewed most strongly against the accused, the evidence only authorized the inference that he was guilty of receiving stolen goods. The verdict finding him guilty of burglary was therefore unwarranted, and should have been set aside on motion for new trial.

Judgment reversed. All the justices concurring, except LITTLE, J., absent.

STATE V. DASHMAN.

153 Mo. 454—55 S. W. Rep. 69.

Decided January 23, 1900.

BURGLARY—STATE BOUND BY CREDIT GIVEN TO TESTIMONY: *Possession of stolen property; theory taken from testimony offered by the State.*

1. The State offered testimony as to the accused's explanation of his possession of property taken at the burglary, which explanation indicated that the accused had knowingly received the property after it was stolen. The State, by the credit given in offering this testimony, "has stamped the nature and character of defendant's crime upon the transaction,"—a crime, different from that charged in the indictment.

Appeal from St. Louis Circuit Court; Hon. Jacob Klein, Judge. George Dashman, convicted of burglary and larceny, appeals. Reversed.

Chas. P. Johnson and Geo. Fickeissen, for appellant.
Edward C. Crow, Attorney General for the State.

SHERWOOD, J. Burglary and larceny were charged in the indictment found against Albert Wietzfield, George Dashman, William Dashman, and Edward Dashman. The goods and building were charged to be the property of Sol Pollock. Severance was granted; defendant was tried, and, being found guilty of both burglary and larceny, was awarded three years in the penitentiary for the burglary, and two years for the larceny.

Defendant demurred to the evidence of the State, but without effect, and offered no testimony in his own behalf. The evidence showed very clearly the commission of the crimes charged, in the store of Pollock; and the identity of the goods produced in evidence with those stolen was established. The evidence also showed that defendant lived at 1526 North Broadway, and the goods in question, being stolen on the night of March 8, 1898, were found afterwards at that place, on the following night, in a trunk of defendant's, and Will Dashman, (a brother of defendant, and one of those indicted,) was there with a woman, and sold some of the stolen coats to parties there present, and a portion of the coats, (three) were found in between the mattresses of the bed on which defendant slept, and dresses of his wife were found in the same room. There was no evidence of defendant's presence at the premises 1526 North Broadway at or after the time of the occurrence of the burglary and larceny, up to the time of his arrest. Defendant said to Detective Friez, after being taken to jail, "I am in this." He further stated to Detective Badger, after his arrival at the locality just indicated, as follows: "He said he was living at that number 1526 North Broadway, and he said the property was first brought in the rear of the Traders' Restaurant, which is No. 1437 North Broadway, and he stated that he knew the parties that came there with it, and he said he knew he had done wrong in allowing it to go into the place at all and I asked him if he couldn't turn the parties up to me, and he got indefinite about it. I know I went

downstairs after he was confined downstairs in the hold-over, and tried to induce him to tell me who it was, and he would not talk to me at all about it. He was mad about something."

This quotation made from defendant's statements to Badger shows very clearly that defendant was guilty of receiving and concealing stolen goods, knowing them to have been stolen, and not of stealing those goods. If guilty of either offense, he certainly could not be guilty of the other. The evidence of the State must be taken as a whole. The evidence of the goods being found in defendant's room is entirely consistent with the theory of receiving and concealing, but evidence of the admissions made by defendant to Badger is entirely inconsistent with any theory other than that of receiving and concealing. The State, having given credit to this latter theory by offering those admissions in evidence, has stamped the nature and character of defendant's crime upon the transaction,—one entirely different from that charged in the indictment,—and cannot now insist on a conviction of burglary and larceny, based on that portion of the evidence relating alone to recent possession of stolen goods. It is unnecessary to say what conclusion we should have reached, had the State omitted to introduce in evidence the admission of defendant made to Badger. The subject of receiving and concealing stolen goods has recently been discussed in *State v. Guild*, 149 Mo. 370, 50 S. W. Rep. 909.

For these reasons, we reverse the judgment and remand the cause, in order that it may be tried in conformity with the foregoing views. **All concur.**

STATE V. FITZGERALD.

72 Vt. 142—47 At. Rep. 403.

Decided March 3, 1900.

BURGLARY AND LARCENY: *Rulings on evidence—Instructions on possession of stolen property—Conflicting instructions—Peremptory instruction denied.*

1. On the trial for burglary, and larceny of 17 watches, the proprietor of the burglarized store, testified that with the purchases of some of the watches, he received bills containing the numbers of the watches, which he compared and found to be correct; that he gave the officers a copy of the list of numbers; the copy being produced,

he stated that it was correct as to all, except one watch. Objection being made, for the first time, after the testimony was in;—held, that the objection and exception came too late.

2. An objection to a question, which does not appear to have been answered, does not avail.
3. Proof that bills with correct numbers in them was lost, laid a proper foundation for secondary evidence.
4. The *corpus delicti* being proved, and there being evidence that the defendant had worked in the store and knew where the watches were nightly secreted; that he slept over the store; and, that shortly after the crime he had possession of, and sold at a very low price, several of the stolen watches,—the motion for a peremptory instruction was properly overruled.
5. There was proof that the defendant was of good character, and, that he disposed of the watches openly; held, that it was error to instruct the jury as follows: "As I have before stated, the whole matter here stands upon the possession of this property. The unexplained possession of the stolen property within a short time after the theft is evidence sufficient to convict a person of the crime by which that property came into his possession, if it produces upon your mind such an effect as enables you to feel sure, beyond a reasonable doubt, that the respondent is guilty of the offense charged;" without calling the attention of the jury to all of the attendant facts and circumstances bearing on the question as to whether the possession was honest or felonious; nor, did a separate instruction on the subject cure the error.
6. It is reversible error to give conflicting instructions, leaving the jury to follow either at will.
7. "The evidence tended to show that some of the watches produced on the trial were found in the hands of one Delaney, in the state of New York, and that they were a part of the watches stolen at the time of the alleged burglary. Delaney was not produced as a witness, and there was no direct evidence as to how he came in possession of the watches, nor connecting the respondent therewith. Relative thereto the court charged the jury, in substance, that there being evidence tending to show a certain number of watches were taken on the same night, and that a portion of them were in the recent possession of the respondent, there was evidence tending to connect him with the other watches lost or taken at the same time." Held, no error.

Exceptions from Bennington County Court; Hon. Munson, Judge.

Morris Fitzgerald, convicted of burglary, brings exceptions. Reversed.

Argued before TAFT, C. J., and ROWELL, TYLER, START, THOMPSON, and WATSON, J. J.

Edward L. Bates, State's Attorney, for the State.

W. B. Sheldon, for the respondent.

WATSON, J. The respondent was indicted and tried for burglarizing the store of Frank Huling, and for the larceny of 17 watches therein being, of the property of Huling. Huling was a witness in behalf of the State, and testified, in substance, that some of these watches were old ones for which he had traded, and some of them were new ones purchased by him of Bogle Bros. of White River Junction, and that when he purchased them he received from Bogle Bros., bills with the numbers of the watches purchased thereon, which he afterwards compared with the numbers on the watches, and found to be correct; that after the burglary he copied the numbers of the watches from some of these bills, and gave a copy to the officer to aid him in looking after the stolen property and in identifying the same. The copied list was in court, and Huling was asked by the State whether the numbers upon that paper or list were the same that he found upon the bills which he had with the watches, to which he answered, "Yes, sir; all but one. There is one there that I am mistaken in." The respondent made no objection until after the answer was given, and the question and answer were allowed to stand subject to exception. The answer was responsive to the question, and the objection and the exception were too late, and are unavailing. *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

John Nash, the officer to whom the copied list was furnished by Huling, was improved by the State as a witness, and, after testifying to the description and numbers of the watches found by him, was asked how the description and the numbers he had given compared with the list furnished him by Huling before he recovered possession of the watches. To the ruling that this might be shown, respondent excepted. But it does not appear by the record that the question was answered, and therefore whether it was proper or otherwise is immaterial, as the respondent was not prejudiced thereby. *Smith v. Insurance Co.*, 60 Vt. 682, 15 Atl. 353.

M. C. Holt, an employe of Huling, who had charge of the store for a long time before and at the time it was burglarized, was a witness in behalf of the State, and produced a bill of two of the watches in question from Bogle Bros. to Huling. This

bill contained the numbers of those two watches, and was properly admitted in evidence in connection with the testimony of the witness, upon the question of identification of the watches traced into the respondent's possession shortly after the burglary, as property stolen from Huling's store at that time.

The bills of some of the other new watches were found by the court to be lost, and the copies thereof, testified to by Huling and used by the officer, were properly admitted as secondary evidence in connection with the testimony of the witness upon the same question. The evidence tended to show that these watches were kept in a show case in the store, and each night were taken therefrom, and put into a box under the counter to remain till morning as a hiding place, in case any one should break and enter the store in the night-time with intent to steal, and that the respondent had been in the employ of Huling, slept over the store, and had seen the watches thus hid away on different occasions, by reason whereof he had knowledge of where they were on the night in question, and that shortly after the burglary he had in his possession some of the stolen property, and disposed of a part thereof at an unreasonably low price,—not more than half of its market value. This evidence, with the evidence introduced, tending to establish the *corpus delicti*, made a case proper to be submitted for the jury, and in overruling the respondent's motion for a verdict there was no error. Wills, Circ. Ev. 162, 163.

In the fore part of the charge the court instructed the jury at different times, in substance, that the whole evidence which connected the respondent with the breaking and entering rested upon the fact of certain personal property that was alleged to have been in the store being found in his possession. Later in the charge the court said: "As I have before stated, the whole matter here stands upon the possession of this property. The unexplained possession of the stolen property within a short time after the theft is evidence sufficient to convict a person of the crime by which that property came into his possession, if it produces upon your mind such an effect as enables you to feel sure, beyond a reasonable doubt, that the respondent is guilty of the offense charged." To this the respondent excepted.

The evidence tended to show that shortly after the burglary the respondent openly, in the hotel at North Hoosick, N. Y., sold

two of the nickel watches in question to the proprietor of the house, and that at the same time the respondent had and exhibited a gold watch of the same lot, and that he subsequently remained about there—just across the street from the hotel—openly for some time, and without apparently trying to hide himself; that he gave one of the watches to the witness Hathaway for carrying him—respondent—from Hoosick Junction to Eagle Bridge, and that at the same time the respondent exhibited two or three watches; that the watch given to the witness for that purpose was an old one of little value. So far as the evidence discloses, this transaction was open, with no apparent purpose of secreting or hiding anything. There was also evidence in the case, of more or less force, tending to show the respondent's previous good character. These were circumstances weighing in the respondent's favor. Mr. Bishop says: "The manner in which the defendant used the thing, as whether openly or not, is material to the effect of the possession." 2. Bish. Cr. Proc. § 746; *Wafford v. State*, 44 Tex. 439; *Minor v. State*, 56 Ga. 630. As to the force of good character, Mr. Wills says: "Good character has a very important bearing in rebutting the presumption of guilt consequent on possession, and in some cases may be sufficient to entirely overcome the presumption." Wills, Circ. Ev. 87.

It was the duty of the court to submit the case to the jury in a manner to require a consideration of not only the fact of the respondent's recent possession of a part of the stolen property, if that fact was established, but also a consideration of all the circumstances for and against him, and, on the whole, say whether they were satisfied of his guilt beyond a reasonable doubt. Mr. Bishop further says: "All the attending circumstances should be shown in connection with the fact of possession, and all should be taken into the account by the jury." 2 Bish. Cr. Proc. § 745. Mr. Wills further says: "It is always a question for the jury, applying to the solution of the problem the common experience and observations of life, whether they are satisfied, from all attending circumstances and other facts in evidence, that the possession was honest or felonious." Wills, Circ. Ev. 82.

Under this instruction of the court, the jury were at liberty

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to consider and determine the question of guilt upon the recent unexplained possession of a part of the stolen property alone, and to convict the respondent if they were thereby satisfied of his guilt beyond a reasonable doubt. A conviction founded upon such a basis wholly deprived the respondent of the benefit of the attending circumstances in his favor, and also of the evidence of good character. This part of the charge was too narrow, and was error. *Brooks v. Thatcher*, 49 Vt. 492. Nor was this error rectified by giving the proper instruction upon the same subject in a later paragraph of the charge. The latter was not given to correct or supersede the former instruction, and was inconsistent therewith. The jury were left to adopt either, and it cannot be said that no harm resulted to the respondent therefrom. *Bovee v. Town of Danville*, 53 Vt. 183.

The evidence tended to show that some of the watches produced on the trial were found in the hands of one Delaney, in the State of New York, and that they were a part of the watches stolen at the time of the alleged burglary. Delaney was not produced as a witness, and there was no direct evidence as to how he came in possession of the watches, nor connecting the respondent therewith. Relative thereto the court charged the jury, in substance, that there being evidence tending to show a certain number of watches were taken on the same night, and that a portion of them were in the recent possession of the respondent, there was evidence tending to connect him with the other watches lost or taken at the same time. To this respondent excepted. We think those facts and circumstances had the evidentiary force given them by the court, and the charge in that regard was without error. *Com. v. McGarty*, 114 Mass. 299.

Exceptions sustained, judgment reversed, verdict set aside, and cause remanded.

STATE V. GILLESPIE.

62 Kansas 469—84 Am. St. Rep. 411—63 Pac. Rep. 742.

Decided February 9, 1901.

BURGLARY—LARCENY—DECLARATIONS OF ACCUSED—POSSESSION OF STOLEN PROPERTY: *Self-serving declarations—Presumptions, circumstances and explanations as to possession of stolen goods—res gestae.*

1. The declarations of a person found in the possession of stolen goods as to how he came by them, made by him at once upon their being discovered in his keeping, are of the *res gestae* because they are parts of the fact of either rightful or wrongful possession, and may be given in evidence upon a trial for the larceny of the goods, even though self-serving in character.
2. The mere possession of goods recently stolen upon the occasion of a burglary is not, alone and of itself, as matter of law, evidence tending to show the possessor guilty of the larceny; nor is such possession, in connection with other circumstances, sufficient, as matter of law, to raise a presumption of guilt of either larceny or burglary; but such possession, in order to constitute evidence tending to show guilt of the larceny, or to be sufficient, in connection with other criminating circumstances, to raise a presumption of guilt of the burglary, must be unaccompanied by any reasonable explanation made by the accused or arising from the evidence in the case, as to how he came by the goods.

(Syllabus by the court.)

Appeal from the District Court, Harvey County; Hon. M. P. Simpson, Judge.

Taylor Gillespie, convicted of burglary and larceny, appeals. Reversed.

Branine & Branine, for the appellant.

A. A. Goddard, Attorney General, and *John J. Hildreth*, County Attorney, for the State.

DOSTER, C. J. This is an appeal from a judgment of conviction of the offenses of burglary and larceny, concurrently committed. The store of one C. J. Gram, in Halstead, Harvey County, was broken into in the night-time and some articles of fruit and confectionery stolen. Suspicion of the crime fell upon the appellant, Taylor Gillespie, a boy aged about 17, who, with two sisters, resided on the outskirts of the town. A few mornings after the commission of the burglary, Gram, the store proprietor, and one Philbrick, a constable, called at the appellant's house to search for the stolen property. After an explanation by these men of the object of their visit, the boy left, and remained away about an hour, during which time some of the goods in question were found in the house. When he returned and learned that the goods had been found, he explained that one Ike Thompson had brought them to him and left them in his keeping, or, rather, to state the fact more accurately, he testified in his defense on the trial that Thompson had brought

them to his house and left them in his charge; and he offered to testify, and likewise to prove by Gram and Philbrick, that he so stated to them immediately on his return to his house, and on being informed of the discovery there of the goods. This offered evidence of the explanation given by him was rejected by the court, and its rejection has been assigned as error. We are quite well assured that it was error.

The general rule is that declarations made by a party concomitantly with the performance of an act by him, and of a nature to explain and characterize it, constitute a part of the act itself. The act and the accompanying declaration together constitute the *res gestæ*, and are both admissible in evidence. This rule is too familiar to require the citation of authorities in order to the understanding or enforcement of it. It may be remarked, however, by way of illustration of its application to particular cases, that it is not limited to instances of self-dis-serving declarations, but extends as well to declarations self-serving in character.

"It makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of or against the party making it. If the act was one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as when the tendency is to show the criminality of the act, and it may be given in evidence by the defendant as well as by the State." *Hamilton v. State*, 36 Ind. 280.

In further illustration of the rule it may be also remarked that it is not limited to declarations accompanying the performance of acts by a party, but applies as well to declarations explanatory of existing facts with which a party stands in immediate personal relation. Declarations *res gestæ* are not merely declarations accompanying acts performed, but they are also declarations concomitant with present facts. The test of their admissibility is spontaneity of utterance. If they appear to be the instinctive, unpremeditated speech of the party in immediate causal relation to the thing in question, they are admissible, whether that thing be an act concurrently performed or a fact concurrently existing, or whether it be inculpatory or exculpatory in character or import. Declarations of this kind explanatory of the possession of stolen property fall entirely within the rule, and their admissibility has been fully authorized by the

courts and text writers. Bishop, in his *Criminal Procedure* (volume 2, § 746), says:

"The discovery of the stolen goods in the possession of the defendant being a fact in the case, the doctrine of the *res gesta* teaches that what he said in connection with this fact—that is, with the discovery—may in general be admitted in evidence on either side, especially where at the time of such discovery he is directly or by implication charged with the theft. For example, his explanation of how he came by the goods, and the like, may be testified to as well in his behalf as against him. And if such explanation appears to the jury reasonable, and it is not shown by the prosecutor to be false, its weight in the scale for him will be very considerable; but if it appears unreasonable, and especially if it is shown to be false, it will bear against him heavily."

Some of the cases most clearly in point are *People v. Dowling*, 84 N. Y. 478; *Henderson v. State*, 70 Ala. 23; *Mitchell v. Territory*, 7 Okl. 527, 54 Pac. 782.

It is not improbable that the court below ruled against the introduction of the offered testimony because the explanation made by the defendant was not given upon the instant of the first imputation against him of guilty possession of the goods. Some of the testimony might furnish a justification for this view, but other parts of it do not. It was not so stated by the court as the ground of the ruling made. It was not pressed upon us by the counsel for the State, but was only casually suggested by them, and therefore we have not critically examined all of the evidence to see whether such may not have been the reason for the court's decision. In fact, it would seem difficult to determine the relation, in point of time and other circumstances, between an accused person's knowledge of a criminating fact and his explanation of it, when the privilege was denied him of testifying what his explanation was, and the time he made it, with relation to his knowledge of the exculpatory circumstance.

Upon the subject of the presumption arising from the possession of recently stolen property the court instructed as follows: "The possession of recently stolen goods taken on the occasion of a burglary is evidence tending to show the guilt of the possessor, and may, when taken in connection with other criminat-

ing circumstances, raise a presumption of guilt sufficient to warrant a conviction of both burglary and larceny."

In *State v. Powell*, 61 Kan. 81, 58 Pac. 968. the question of the presumption arising from the possession of recently stolen goods taken on the occasion of a burglary was given consideration. In that case the court below had instructed that the unexplained possession of recently stolen property was *prima facie* evidence of the guilt of the larceny, and when burglary was charged in connection with the larceny, and the larceny could not have been effected without the commission of the burglary, the possession of the stolen property was also *prima facie* evidence of the burglary. This instruction was held to be erroneous because of the failure to include "other criminating circumstances" than the possession of the stolen property as necessary to raise the presumption of guilt of burglary. As to the conditions under which a presumption of guilt of burglary as well as larceny arises, the instruction of the court in this case omitted the statement of one of the essential facts justifying the presumption. That was the lack of explanation of the defendant's possession of the property. The court instructed that the possession of recently stolen property taken on the occasion of a burglary was evidence tending to show the guilt of the possessor, and that, of course, meant his guilt of both burglary and larceny, because they were both charged in the information, and were both the subjects of investigation; and the court also instructed that such possession, in connection with other criminating circumstances, might be sufficient to raise a presumption of guilt of both burglary and larceny. Now, the unexplained possession of property recently stolen from a burglarized house may be evidence tending to show guilt of both offenses; but it cannot be that the mere possession of recently stolen property is, *as matter of law*, evidence tending to show the possessor to be guilty of the larceny, because, if such be the case, it might tend so strongly to show the guilt as to alone justify conviction.

Nor do we think that, *as matter of law*, the mere possession of goods recently stolen on the occasion of a burglary may be sufficient, even in connection with other criminating circumstances, to raise a presumption of guilt of the burglary. The difference in strength and cogency between evidence tending to show guilt and evidence sufficient to raise a presumption of guilt is not

great enough, if it exists at all, to justify the drawing of distinctions between the rules applicable to the two states of moral conviction they generate. As just remarked, evidence tending to show guilt may tend so strongly to show it as to raise a presumption of guilt; and a presumption of guilt, if not rebutted, is sufficient to convict of crime. It is the *unexplained* possession of recently stolen goods that tends to show guilt or raises a presumption of guilt of the larceny, and it is the *unexplained* possession of goods recently stolen on the occasion of a burglary that tends to show guilt or raises a presumption of guilt of the burglary. In the case of *State v. Powell, supra*, the instruction held to be erroneous was not criticised because lack of explanation by the possessor of the stolen goods was not included among the conditions giving rise to the presumption of guilt. In fact, in that case lack of explanation was distinctly included among the elements of the presumption, so far as the larceny was concerned. The instruction was held to be erroneous because the court had ruled that the possession of property recently stolen on the occasion of a burglary was sufficient, without other criminating circumstances, to raise the presumption of guilt of the burglary. The instruction might have been criticised because of its failure to include lack of explanation as one of the necessary additional criminating circumstances, but the question in the case was not what particular circumstances should accompany the possession of the goods in order to raise the presumption, but it was whether mere possession without any other circumstance, was sufficient; hence, it did not become necessary to consider lack of explanation by the possessor of the goods as a condition giving rise to the presumption. However, it is quite apparent that the opinion in that case proceeded upon the assumption that the law required lack of explanation of the possession of stolen goods taken from a burglarized house to constitute an element necessary to show guilt or to raise a presumption of guilt of both offenses, because, among other things, it was remarked: "It has been frequently held in this State that such possession, unexplained, is *prima facie* evidence of larceny;" and again: "We do not feel warranted in still further extending the presumption that the evidence is of itself sufficient, if unexplained, to warrant a conviction for burglary."

We think the rule stated by us obtains generally in the other States.

In *Orr v. State*, 107 Ala. 35, 18 South. 142 the court says:

"Whenever there is evidence tending to explain the possession; it is error to charge the jury, 'that recent possession of stolen property is *prima facie* evidence of guilt,' without the qualification 'unexplained.' The words 'may be' should be used in the place of the word 'is.' It is the 'unexplained' recent possession of stolen property that authorizes the inference of guilt. Whether the explanation offered is credible or satisfactory is a question for the jury."

See, to same effect, *Blaker v. State*, 130 Ind. 203, 29 N. E. 1077; *Robb v. State*, 35 Neb. 285, 53 N. W. 134.

Other claims of error are made, but we do not consider them well founded; but for the errors above pointed out the judgment of the court below is reversed, and a new trial ordered.

TAYLOR V. TERRITORY.

7 Ariz. 234—64 Pac. Rep. 423.

Decided March 19, 1901.

BURGLARY: *Possession of stolen property—Presumption of innocence as declared by statute construed and explained—Territory v. Casio overruled—Instruction as to possession of stolen property, etc.—NIGHT-TIME: Statutory definition of the term, night-time—Evidence as to breaking in the night-time sufficient.*

1. By the statutes of Arizona, burglary committed in the night-time, is termed burglary in the first degree, and the term—"night-time," is defined as,—*"the period between sunset and sunrise."* It was proved that the store in question was closed by its owner in the night-time, and, that upon the following morning, not later than 7:30 o'clock, he was informed of the fact, and found, that his store had been burglarized. The burglary was committed by breaking a cellar door, cutting through the floor, getting into the store room, blowing open the safe and rifling its contents, which must have taken considerable time,—the burglars escaping before detection. The sun rose that morning at 7:04 o'clock. Held—that the jury was justified in inferring that the breaking and entering was in the night-time.
2. The following instruction was held to be erroneous:
"The jury are instructed that, where a burglary is connected with a larceny, mere possession of stolen goods, without other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence

of burglary. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person who gives a false account, or refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny."

3. Section 1645 of the Penal Code which declares that, "a defendant . . . is presumed to be innocent until the contrary be proved, and, in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted,"—"does not mean that he is presumed to be innocent until one fact is proved against him in the case, namely, the exclusive possession of recently stolen property. It requires more than one fact, however potent, to overthrow the presumption of the defendant's innocence. It requires the verdict of a jury, and until that verdict is returned and accepted by the court, the defendant is, throughout the case, presumed innocent, and on the return of the verdict by the jury he is for the first time presumed to be guilty."
4. If the mere possession of stolen property, "is sufficient to convict, the innocent are as likely to suffer as the guilty."
5. The case of *Territory v. Casio*, 1 Ariz. 485, 2 Pac. Rep. 755 which held that "a prisoner's exclusive and unexplained possession of stolen property recently after the theft raises a presumption that he is the thief, and such presumption takes the burden of proof from the prosecution and lays it upon the prisoner," is overruled.

Appeal from District Court, Gila County; before Hon. F. M. Doan, Judge.

Ed. J. Taylor, convicted of burglary, appeals. Affirmed.

E. J. Edwards, for appellant.

C. F. Ainsworth, Attorney General, for respondent.

DAVIS, J. The appellant was convicted of burglary of the first degree, alleged to have been committed on or about January 10, 1900, by entering a store in the night-time with intent to commit larceny. He appeals from the judgment, and assigns two grounds of error, upon which he relies for reversal.

1. It is first claimed that the evidence is insufficient to sustain the verdict and judgment. Under our statute, "every person who enters any house, room, apartment, tenement, shop, warehouse, store, * * * with intent to commit grand or petit larceny, or any felony, is guilty of burglary." Paragraph 713,

Pen. Code. "Every burglary committed in the night-time is burglary of the first degree, and every burglary committed in the daytime is burglary of the second degree." Paragraph 715, Id. "The phrase 'night-time,' as used in this chapter, means the period between sunset and sunrise." Paragraph 717, Id. From the statement of facts it appears that on the night of January 10, 1900, or in the early morning following, the store of one Victor B. Bloom, in the town of Globe, was entered, the safe broken open, and some money and valuables taken therefrom, including about four hundred dollars in negotiable checks drawn by the Old Dominion Copper Mining & Smelting Company on the Bank of California, of San Francisco, California. About twelve days later the appellant, in person, presented these checks for payment at the bank upon which they were drawn, and was shortly thereafter arrested, brought back to Arizona, and prosecuted. Counsel for the appellant insists that there is no evidence in the record to show that the burglary was committed between the hours of sunset and sunrise. In this contention we think he is not sustained. Victor B. Bloom, the owner of the store which was burglariously entered, and a witness for the prosecution, testified as follows: "I did not notice anything out of the way in the store on the night of the 10th of January, 1900, when I closed up. I was called between 7 and 7:30 o'clock on the morning of the 11th of January by Mr. Flood, who came running over and said the safe was blown open. I dressed in a hurry, and went over to the store. The safe had been blown open and the books thrown all over the floor, the money chest drawn out, and the contents taken. The entrance was made through the cellar door. The cellar door was broken open by some one who got into the cellar, cut a hole through the floor, and got into the store. Checks and cash were taken. I can identify the checks. These are the checks that I cashed, and were afterwards taken out of my safe." It is a matter within the common knowledge of all, and a fact of which we take judicial notice, that in the locality of Globe, on January 11, 1900, the sun rose at 7:04 a. m. If, therefore, the burglary was not discovered before 7:30 a. m., there would be left only 26 minutes for the perpetration of the crime and the escape of the criminal, unless the operations were in progress before sunrise; and when it is considered that these operations necessarily included the

successive acts of breaking open the cellar door, cutting a hole through the floor, getting into the storeroom, blowing open the safe, methodically rifling its contents, and subsequent flight, we think there is not lacking evidence in this case from which the jury could rightfully infer that the burglary was committed in the night-time.

2. The appellant complains of the following instruction which was contained in the charge of the court: "The jury are instructed that, where a burglary is connected with a larceny, mere possession of stolen goods, without any other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence of the burglary. But where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person who gives a false account, or who refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny." It is found frequently repeated in the books of the law that the recent, unexplained possession of stolen goods creates a presumption that the possessor is guilty of the theft. The nature of this presumption is thus stated by Greenleaf: "Possession of the fruits of crime, recently after its commission, is *prima facie* evidence of guilty possession; and if unexplained, either by direct evidence or by attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive." This statement has been quoted as the correct expression of the law in many cases, and in the early case of *Territory v. Casio*, 1 Ariz. 485, 2 Pac. 755, it was held by this court that "a prisoner's exclusive and unexplained possession of stolen property recently after the theft raises a presumption that he is the thief, and such presumption takes the burden of proof from the prosecution and lays it upon the prisoner." Many authorities, both English and American, ascribe to this presumption the character of a presumption of law, which means that, if it is not rebutted by direct evidence or by circumstances, it becomes conclusive against the prisoner. The more recent and

better view, however, ascribes to it the character of a presumption of fact, which means that it is a presumption which the jury are at liberty to draw or not, as they shall see fit, and which hence does not necessarily become conclusive when not rebutted. The law really raises no presumption against a defendant in a larceny or burglary case, but expressly declares that "a defendant * * * is presumed to be innocent until the contrary be proved, and, in case of a reasonable doubt whether his guilt be satisfactorily shown, he is entitled to be acquitted." Paragraph 1645, Pen. Code. This does not mean that he is presumed to be innocent until one fact is proved against him in the case, namely, the exclusive possession of recently stolen property. It requires more than one fact, however potent, to overthrow the presumption of the defendant's innocence. It requires the verdict of a jury, and until that verdict is returned, and accepted by the court, the defendant is, throughout the case, presumed innocent, and on the return of the verdict by the jury he is for the first time presumed to be guilty. *Johnson v. Territory* 5 Okl. 695, 50 Pac. 90. We know that many kinds of personal property pass easily from hand to hand, and it is obvious that, if the mere possession is sufficient to convict, the innocent are as likely to suffer as the guilty. There are frequent cases in which an explanation would be impossible, and in such cases to throw the burden of explanation upon the accused would be to slam the door of justice in his face. *People v. Chambers*, 18 Cal. 383. Moreover, a presumption which would require an explanation from the defendant to prevent it becoming conclusive of his guilt would be in direct conflict with paragraph 2040 of the Penal Code, which is intended to shield him from any unfavorable presumption which his refusal to testify might create. And, with all due respect for the previous adjudication of this court, we do not believe that the case of *Territory v. Casio*, *supra*, correctly states the law upon this point as it is understood and accepted by the modern and better authorities. Recognizing that the jury are the sole and exclusive judges of the facts proved, and the inferences to be drawn therefrom, an expression of the law more in harmony with the current authority would be substantially as follows: The possession of stolen goods by the accused recently after the larceny, if unexplained, is a circumstance from which the jury may infer his complicity in the

larceny. Its value as evidence, however, is to be determined by them alone. In determining the weight to be attached to this circumstance as evidence tending to prove guilt, the jury should take into consideration all the facts and circumstances connected with such possession, and their relation to the other proofs in the case. *Methard v. State*, 19 Ohio St. 363; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785; *Smith v. State*, 58 Ind. 340; *State v. Hodge*, 50 N. H. 510; *State v. Walters*, 7 Wash. 246, 34 Pac. 938; *Johnson v. Territory* (Okl.) 50 Pac. 90; *Lehman v. State*, 18 Tex. App. 174.

The point is sought to be made that the instruction in the case at bar assumed the existence of certain facts which had not been proven, viz. that the defendant gave a false account, or refused to give any account, of the manner in which the checks came into his possession, and that his conduct was guilty at the time he was found with them in his possession. We do not give to the instruction that effect. The court was only stating a legal principle in the abstract. It was applicable to the evidence in the case, however. A witness for the prosecution (Edmond Byram) had testified to having seen the defendant present these checks at the bank in San Francisco, and that, when there seemed to be some controversy about them, defendant went away, leaving them on the paying teller's window; that he again saw the defendant when under arrest, two days afterwards, at which time the latter denied all knowledge of the checks. The testimony of another witness (David Heron), who was a deputy sheriff at Globe, had been to the effect that he had gone to San Francisco to make the arrest; that, on first meeting the defendant there, the latter denied having any knowledge concerning the checks, and also stated that he did not know where the town of Globe was; that shortly after this conversation the defendant told him that he was the man who had presented the checks at the bank, and that he had received them from a friend named Burke. Other witnesses had testified to having seen the defendant in Globe about the time of the burglary. It is also objected that the jury was charged as to the effect of the evidence. In this case a larceny having been committed in connection with the burglary, testimony which tended to prove the larceny would also tend to prove the commission of the burglary. It is not trenching upon the province of the jury to say that particular evidence

tends to prove a matter which it clearly does tend to establish. Such an instruction is not an expression of opinion as to the weight or effect of the evidence, nor that any fact has been proved thereby. There is not contained in the instruction complained of any departure from the law which could have misled the jury to the prejudice of the defendant.

No error appearing in the record, the judgment of the District Court is affirmed.

STREET, C. J., and SLOAN, J., concur.

PEOPLE V. BOXER ET AL.

137 Cal. 562—70 Pac. Rep. 671.

Decided November 7, 1902.

BURGLARY: *Possession of stolen property—Erroneous and misleading instructions.*

1. Held that the following instruction, was vague, confusing and unsound, and, would render the defendants liable for burglary, if they received the goods *subsequent* to the burglary:
"If the jury believes from the evidence, that, beyond a reasonable doubt, that any of the property mentioned in the evidence was stolen from the premises described in the information and received into the possession of either of the defendants shortly after being stolen, the failure of such defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain his possession in order to remove the effect of his possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such."
2. The mere possession of stolen property is not sufficient to justify an inference of guilt. To justify a verdict of guilty of either larceny or burglary, other circumstances beyond an unexplained recent possession must appear in evidence. For this reason an instruction is held to be prejudicially misleading.

Supreme Court of California; Department 1.

Appeal from Superior Court, Lake County; Hon. R. W. Crump, Judge.

George Boxer and Charles San Diego, convicted of burglary, appeal. Reversed.

Thomas B. Bond, for appellants.

U. S. Webb, Attorney General. *A. A. Moore, Jr.*, Deputy Attorney General, and *M. S. Sayre*, District Attorney, for respondent.

GAROUTTE, J. The defendants, two Indians, have been jointly charged, tried, and convicted of the crime of burglary, and now appeal from the judgment. The evidence upon the part of the People tended to show that they entered a certain saloon-building and committed larceny therein by taking therefrom certain personal property, consisting of cigarettes, a bottle of gin, etc. There was also evidence offered by the People tending to show that this property, or a portion of it at least, was found in the possession of one or both of these defendants a short time after the unlawful breaking and entering is claimed to have occurred.

The court gave the jury the following instruction: "If the jury believe from the evidence, beyond a reasonable doubt, that any of the property mentioned in the evidence was stolen from the premises described in the information and received into possession of either of the defendants shortly after being stolen, the failure of such defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain his possession in order to remove the effect of his possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such." This instruction upon its face is not clear and explicit, but, on the contrary, is quite confusing. At the same time we deem it unsound, as declaring a principle of criminal law. As already stated the defendants were upon trial charged with burglary, and, that being the case, the mere fact, if it be a fact, that subsequent to the burglary they received the fruits of the crime into their possession, cannot be said to be a circumstance tending to show their guilt of the crime of burglary. In cases of larceny, the recent unexplained possession of the stolen property is a circumstance tending to show guilt. Probably the same may be said as to the recent unexplained possession of stolen property the fruits of a burglary, but this instruction assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties. It is very evident that nothing which these defendants could do in the way of ac-

cepting or holding the possession of the stolen property after the burglary had been committed would tend to prove their guilt of the crime of burglary. Indeed, the instruction assumes the commission of the burglary by another prior to the possession of the property by these defendants. Under the statement of facts as presented by the instruction, the defendants would not be called upon to show how and by what means they came into possession of the property taken from the building, and the circumstance of possession in them could in no way tend to show their guilt of the crime of burglary.

The court also gave a second instruction, as follows: "To justify the inference of guilt from the facts of possession of stolen property, it must appear that the possession was personal; that it involved a distinct and conscious assertion of possession by the accused, or that he brought them there; and therefore a finding of stolen property in the house of either defendant in this case, or apartment, is not a circumstance tending to show guilt against him, unless the house or room be in his exclusive occupation, unless the jury believe from the evidence that he brought it there. If the property were only found lying in a house or room in which the defendant lived jointly with others equally capable of having committed the theft, no definite presumption of guilt can be made, unless the evidence shows that he brought them there." This instruction is clearly misleading to the defendants' prejudice. It begins by saying: "To justify the inference of guilt from the facts of possession of stolen property." It may be declared as a principle of law that the mere possession of stolen property by a defendant is not sufficient evidence upon which to justify an "inference of guilt" by the jury. There must be other circumstances besides the recent unexplained possession of stolen property to justify a verdict of guilty, either of burglary or larceny. Again, the instruction concludes, in speaking as to possession of stolen property, by saying: "No definite presumption of guilt can be made unless the evidence shows that he brought them there." As already suggested, evidence of the recent unexplained possession of stolen property, standing alone, is not sufficient to justify a verdict of guilty, even in a case of larceny, and the court is not justified in intimating to the jury that a "definite presumption of guilt" could arise upon any such state of facts.

For the foregoing reasons the judgment is reversed, and the cause remanded to the trial court.

HARRISON, J.; VANDYKE, J., concurred.

Note.—In *People v. Brady*, 65 Pac. Rep. 823, decided July 9, 1901, the Supreme Court of California approved the following instruction:

"The court instructs the jury that the possession of stolen property recently after the commission of the alleged offense by the persons charged, if you find any such property to have been in their possession, if unexplained, is a circumstance tending to prove their guilt; and if the jury believe from the evidence that the defendants were found with the stolen property in their possession, if you find any was feloniously taken, then, to determine the weight to be attached to that circumstance as tending to prove guilt, the jury should consider all the circumstances attending such possession, proximity of the place where found to the place of the alleged burglary, the lapse of time since the property was taken, the character and nature of the property taken, whether the property was concealed, whether the parties denied or admitted the possession, and the demeanor and character of the accused. All of these circumstances, so far as they have been proved, are proper to be taken into account by the jury in determining how far the possession of the property by the accused, if it has been proved, tends to show his or their guilt."

LEISENBERG v. STATE.

60 Neb. 628—84 N. W. Rep. 6.

Decided October 18, 1900.

BURGLARY: *Information sufficient; not necessary to state the hour of the offense; time of filing, etc.—Possession of stolen goods—Evidence as to time of offense—Instruction—Verdict on conjecture.*

1. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.
2. It is not essential in an information or indictment charging burglary, to state the particular hour of the night at which the crime was committed.
3. Where no information or indictment is filed against a defendant charged with the commission of a crime during the term at which he is held to answer, his detention is unlawful, and he is entitled to be discharged.
4. But if, at a subsequent term of the court, an information is filed, and he pleads not guilty, the court has power to try the issue raised, and after verdict of conviction has been rendered, it is not error to deny a motion in arrest of judgment.

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5. It is not error for the court in a criminal case, to say to the jury, as part of its charge: "You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered."
6. The fact that a building was feloniously broken and entered between the hours of 6:30 P. M. and 9 P. M. on March 29 does not show, with the requisite degree of moral certainty, that the crime charged was committed in the night season.
7. A verdict resting upon conjecture cannot be permitted to stand.
(Syllabus by the court.)
8. Possession of goods taken by breaking and entering is as much evidence as in cases of larceny. The weight of such evidence is for the jury. (Additional syllabus by J. F. G.)

Error to District Court, Douglas County; Hon B. Q. Baker; Judge.

Henry Leisenberg, convicted of burglary, brings error. Reversed.

Winfield S. Strawn, for plaintiff in error.

Constantine J. Smyth, Attorney General and *Willis D. Oldham*, Deputy, *contra*.

SULLIVAN, J. Henry Leisenberg was convicted of burglary in the District Court for Douglas County, and sentenced to imprisonment in the penitentiary for a period of two years. The information was drawn under section 48 of the Criminal Code, and charged a breaking and entering in the night season with intent to steal. The particular hour at which the crime was committed was not averred, and upon that omission was based a motion in arrest of judgment. The trial court held that the facts pleaded constituted an offense, and refused to allow the motion. This ruling was not erroneous. The statute states the elements of the crime, and it is, in such case, generally considered sufficient to describe it in the language of the statute. *Whitman v. State*, 17 Neb. 224, 22 N. W. 450; *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; Wharton Criminal Pl. & Prac. (8th Ed.) Sec. 220. The requirements of good pleading are ordinarily satisfied by alleging the ultimate facts, and no sufficient reason is perceived for making the information or indictment charging the crime of burglary an exception to the rule. The intimation in *Winslow v. State*, 26 Neb. 312, 41 N. W. 1116, that the averment of the particular hour is essential, is not, we

believe, supported by any American authority, and cannot be approved. *Commonwealth v. Williams*, 2 Cush. 582; *People v. Burgess*, 35 Cal. 115. "As a rule, it is unnecessary," says Wharton, "to state the hour at which the act was done, unless rendered so by the statute upon which the indictment is framed. In burglary, indeed, it is usual to state it; but alleging the offense to have been committed in the night, without mentioning the hour, has been held to be sufficient." Wharton Criminal Pl. & Prac. (8th Ed.) Sec. 130.

Another ground upon which the defendant moved in arrest of judgment was the failure of the Prosecuting Attorney to file an information against him during the term of court at which he was held to answer. Under the provisions of section 389 of the Criminal Code, the defendant was entitled to be discharged from custody because no formal accusation was lodged against him at the January term, although such term adjourned on the day following that upon which the preliminary examination was held. *Ex parte Two Calf*, 11 Neb. 221, 9 N. W. 44; *State v. Miller*, 43 Neb. 860, 62 N. W. 238. The order made by the magistrate at the preliminary examination was effective during the January term, but no longer. When that term adjourned its force was spent, and the defendant was held in jail without authority. His detention was wrongful, but that did not deprive the court of power to try the issue raised by his plea of not guilty. The offense charged was within the jurisdiction of the court, and the facts pleaded constitute a crime. This being so, the motion in arrest of judgment was properly denied. Criminal Code, Sec. 493.

Fault is found with the eighth instruction, in which the court said to the jury: "You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." This instruction has never, to our knowledge received judicial condemnation on the contrary, it was considered and distinctly approved in *Willis v. State*, 43 Neb. 102, 61 N. W. 254, and *Barney v. State*, 49 Neb. 515, 68 N. W. 636.

It is further contended on behalf of the defendant that the evidence does not warrant the conclusion reached by the jury. This contention must be sustained. It appears the building de-

scribed in the information was broken and entered after 6:30 p. m., on March 29, 1900, and that at 9 o'clock of the same evening the defendant was found in possession of some tools which were the fruits of the crime. He took the stolen property to a second-hand store, where he sold it for about one-sixth of its real value, stating to the purchaser that his name was August Baker. At the preliminary examination he testified that he received the tools from August Baker, but did not state under what circumstances or for what purposes they were received. This was practically all the evidence given at the trial tending to show defendant's complicity in the crime. No exculpatory proof was offered. Possession of stolen property is, under some circumstances, evidence of larceny, and it may or may not be evidence of burglary. In *Metz v. State*, 46 Neb. 547, 555, 65 N. W. 190, it is said: "In burglary it is necessary that the breaking and entering be committed in the night-time, and the presumption will not be indulged that the breaking and entering were in the night season from the fact alone that the defendant was found in possession of the fruits of the crime; but in prosecutions for burglary, like those for larceny, the effect to be given to the fact of possession is solely for the jury." This is undoubtedly a correct statement of the rule. *Knickerbocker v. People*, 43 N. Y. 177; *State v. Bishop*, 51 Vt. 287; *State v. Snell*, 46 Wis. 524, 1 N. W. 225; *Neubrandt v. State*, 53 Wis. 89, 9 N. W. 824; *Trent v. State*, 31 Tex. Cr. Rep. 251, 20 S. W. 547; 3 Greenl. Ev. (15th Ed.) p. 106, note b; Wills, Circumstantial Evidence (4th Ed.) 61; 1 Wharton Criminal Law (8th Ed.) section 813.

In this case the evidence warrants the conclusion that the property found in the defendant's possession was taken from Naught, the complaining witness, by breaking and entering his shop; and consequently the fact of possession points with as much certainty to a felonious breaking and entry of the shop as it does to the theft of Naught's property. It indicates that Leisenberg violated either section 48 or 53 of the Criminal Code; that he broke and entered the shop of the complaining witness either in the night season or in the day time. And the fact of possession, coupled with the other incriminating circumstances, namely, the sale of the tools at much less than their actual value, and the attempted concealment of identity (Wills.

Circumstantial Evidence 57), make the inference that defendant was guilty of house breaking altogether justifiable. But, while the evidence warranted the jury in finding that Leisenberg was a criminal, it was not sufficient to justify them in finding that he was guilty of the particular crime charged. Naught's shop was broken and entered after 6:30 o'clock p. m., but how long after does not appear. Neither was it shown whether the time referred to was standard time or true local time. There is no evidence that the act in question was not done in the day time, or that it was done in the night season; and there is no fact in the record from which such conclusion may be fairly deduced. Upon this essential point the jury made no deduction from the facts. They simply guessed. A verdict resting upon conjecture cannot be permitted to stand. *Ashford v. State*, 36 Neb. 38, 53 N. W. 1036; *Waters v. State*, 53 Ga. 567; *People v. Griffin*, 19 Cal. 578.

The judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

STATE V. NORRIS.

27 Wash. 453—67 Pac. Rep. 983.

Decided February 26, 1902.

BURGLARY—OTHER CRIMES: *When evidence of other crimes is admissible—Testimony of co-defendant not conclusive—Harmless error—Evidence sufficient to sustain the verdict.*

1. In the prosecution for one crime, evidence showing the complicity of the accused in the commission of a second crime is admissible, where the testimony in relation to the second crime involves facts necessary to be shown in establishing the charge for which the accused is on trial.
2. The refusal of the court to direct a verdict of not guilty was not error, when the evidence showed that the accused when arrested were in the company of others who admitted committing the burglary charged; that they had all been seen together on the evening of the burglary just outside the town where the crime was committed; that the property taken was found in their possession; that a house occupied by Japanese, situated between the place of the burglary and the point where the accused were arrested, was visited the same night by four or five men and burglarized, some of the stolen property being

in the possession of the party when arrested, and that the party of burglars went from the Japanese house in the direction in which the accused were afterwards found with the others at the time of arrest. The fact that one of the accused who had entered a plea of guilty testified that the crime was committed by two alone who pleaded guilty was merely for the jury to weigh in connection with the other circumstances shown.

3. Allowing a witness to testify that the accused did not seem to show any curiosity to find out what he was arrested for, while technically erroneous as a statement of the witness' conclusion, was not prejudicial error.

Appeal from Superior Court, Snohomish County; Hon. John C. Denney, Judge.

William Norris and James McDonald, convicted of burglary, appeal. Affirmed.

Frank B. Wiestling, for the appellants.

H. D. Cooley, Prosecuting Attorney, for the State.

HADLEY, J. Appellants, Norris and McDonald, together with three others, Mitchell, Williams, and Wayne, were jointly charged with the crime of burglary, alleged to have been committed in the town of Arlington on the 6th day of April, 1901. Mitchell and Williams each tendered a plea of guilty, and each was sentenced to a term of three years' imprisonment in the penitentiary. The other three were tried by a jury, and a verdict of guilty returned as to each. A motion for a new trial was interposed and was granted as to Wayne, with the consent of the Prosecuting Attorney, not for any errors at the trial, but by reason of the youth of said defendant, and because, as expressed in the record, "the ends of justice would thereby best be subserved." The motion was denied as to Norris and McDonald, and thereafter the court rendered judgment that each of them should be punished by serving a term of seven years' imprisonment in the penitentiary. From said judgment they have appealed.

At the trial, when the testimony for the State was closed, the appellants moved the court to direct the jury to return a verdict of not guilty. The motion was denied. The motion was renewed at the close of all the testimony, and was again denied. The denial of the motion in each instance is assigned as error. It is also assigned as error that the court permitted the testimony

of certain Japanese witnesses to go before the jury, which was offered for the purpose of showing the whereabouts of appellants on the night of the alleged burglary, but which incidentally tended to connect appellants and their codefendants with the commission of a crime other than that charged in the information. We will first discuss the assignment of error last above mentioned.

There had been evidence to the effect that a burglary had been committed at the time and place charged. The testimony showed that the building had been entered some time during the night, and two overcoats and a small amount of money left in a cash drawer and also in a slot machine were stolen. When arrested the next day, the five defendants were together. The Japanese witnesses lived in a small house not far from the location of the premises where the burglary is alleged to have been committed. They testified that on the night of the burglary four or five men came to their house, and at least two of them entered the building, and stole certain articles, such as a watch, a knife, and a pair of pants. They were awakened by the presence of the men in the house, but could not see them in the dark so as to identify them. One of the witnesses grappled with one of the men in the house, and caught him about the leg, but the man broke away and ran. They saw other men outside of the house. One of the witnesses testified that he afterwards saw the defendant Wayne wearing the pants that were stolen. The witnesses also identified other property found in the car at the place where the defendants were arrested as articles stolen from their house at the time above mentioned. One of the witnesses also testified that he followed the men, and watched them for a time, and that they went in the direction of a bridge toward McMurray, where the appellants and their codefendants were found together and arrested the next day. It was also shown by their testimony that the Japanese house was on the way from the house where the burglary is charged to have been committed in going from there to the bridge and toward McMurray. The above testimony was offered, not for the purpose of showing that another crime was committed, but for the purpose of showing that the accused were together on the night of the burglary in the immediate vicinity of the place where the crime charged was committed. Incidentally the testimony concerning

the identification of the property found at the place where the accused were arrested did develop the fact that another crime had been committed, with which the accused may have been connected; but its primary object was that above stated, and the detailed circumstances became necessary in order to reach the ultimate fact sought as applicable to the crime charged. Appellants cite the case of *State v. Gottfredson*, 24 Wash. 398, 64 Pac. 523, decided by this court. It was there held that evidence tending to show that the defendant had stolen another horse was erroneously admitted for the reason that it was not so connected with the crime charged as tended to establish its commission, and was only effective to prejudice the jury. In the opinion in that case, however, the court stated the following as a general rule:

"The general rule is well established that proof of the commission of a separate and distinct crime will not be admitted for the purpose of aiding the conviction of defendant for the crime charged. There are exceptions, however, to this general rule,—as where the testimony shows a connection between the transaction under investigation and some other transaction, and where they are so interwoven that the omission of the testimony in relation to the other crime would detract something from the testimony which the State would have a right to introduce as tending to show the commission of the crime charged by the defendant."

Thus the principle was recognized in that case that, where the testimony in relation to another crime involves facts which the State would have a right to prove if they were unconnected with such other crime, they are properly admissible, notwithstanding it may appear that they are connected with a separate and distinct crime.

Appellants also cite *State v. Thompson*, 14 Wash. 285, 44 Pac. 533, and *Same v. Bokien*, 14 Wash. 403, 44 Pac. 889. The objectionable testimony in these cases, however, bore no relation to the crimes charged, and was not connected with any chain of circumstances which tended to prove guilt of the particular crimes charged. It could, therefore, have no other effect than to prejudice the jury against the accused. In *State v. Hyde*, 22 Wash. 551, 61 Pac. 719, it was held that evidence for the purpose of tracing the movements of the accused and one in-

dicted jointly with him both before and after the crime is competent, although the testimony of a witness may incidentally disclose the commission of another crime. The principle here under consideration is ably discussed in *State v. Baker*, 23 Ore. 441, 32 Pac. 161. The defendants in that case were on trial for stealing a mare. The prosecution introduced evidence that the mare described in the indictment was stolen from one N. at night; that on the same night another mare and other property were stolen from neighbors of N.; that the defendants were afterwards seen traveling towards eastern Oregon, with the mares in their possession; that on a direct route from there to Salem other property had been stolen; and that when the defendants were arrested at Salem, soon after, they had the mare described in the indictment and the other stolen property in their possession. It was held that the evidence was admissible, since it was impracticable to trace the defendants' connection with N.'s mare from the time it was stolen until their arrest without disclosing the commission of the other crimes. In the course of the opinion is found the following:

"Under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer. And yet, while this is the general rule, the exceptions to it are so numerous that it has been said, 'It is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.' *Trogon v. Com.*, 31 Gratt. 870. In cases where the prosecution relies on circumstantial evidence for a conviction, and the evidence offered forms logically one link in the chain of circumstances, tending to show that he who committed the one crime must have committed the other, or is so intermingled and connected with the crime charged as to form one entire transaction, it is admissible, although it may tend to prove distinct felonies. The purpose of such proof, however, should be explained in the charge of the court. Whart. Cr. Ev. § 31; *Brown v. Com.*, 76 Pa. 319; *Mason v. State*, 42 Ala. 532; *Long v. State*, 11 Tex. App. 381; *Jones v. State*, 14 Tex. App. 85; *House v. State*, 16 Tex. App. 25; *Heath v. Com.*, 1 Rob. (Va.) 735. 'It frequently

happens,' says Brockenbrough, J., 'that, as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of these circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases it is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove the prisoner has been guilty of other crimes than that charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence that they cannot be departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them more than other facts apparently innocent.' *Walker v. Com.*, 1 Leigh, 574."

In the light of the foregoing discussion and authorities, we think the evidence was properly admitted. The State was relying upon circumstantial evidence, and the circumstances detailed by the Japanese witnesses, we think, were such as should properly have gone to the jury, and it was for the jury to determine from the circumstances what connection, if any, appellants had with the crime charged. Property taken from the place of the alleged burglary was found in a car on the railroad track where the defendants were found when arrested. Two defendants had already entered a plea of guilty. The State sought to show that all the defendants had participated in the burglary, and therefore sought to trace the whereabouts of the men from the time of the burglary until the time of their arrest. It was competent for the State to show that the men were in the immediate vicinity of the crime charged as bearing upon the possibility that they could have engaged therein. The testimony of the Japanese witnesses was such as was proper for the jury to consider in that connection, and as showing circumstances tending to trace their movements afterwards up to the time of their arrest.

We now recur to the assignment of error that the court denied the motion to direct a verdict of not guilty. As already stated, this motion was first made at the close of the State's testimony. We have examined the testimony in the record, and from the foregoing discussion it will be observed that we think the circumstances in evidence were such as the State had the right to

have submitted to the jury. The appellants, when arrested, were in company with those who had been admittedly connected with the crime. There was also evidence that the five men had been seen together just outside of the town of Arlington between six and seven o'clock in the evening of the night the burglary was committed. Property taken from the place of the burglary was found at the place of arrest, and other property was also found at the same place, which belonged to the occupants of the Japanese house; and the testimony showed that four or five men were present at said house, and that they went from there in the direction where appellants and their codefendants were found and arrested the next day. Under these circumstances we think it was for the jury to say whether appellants were participants in the crime charged. The motion was renewed at the close of all the testimony. It is true one of the defendants who had entered a plea of guilty testified that he and his codefendant, who had acknowledged the crime, alone committed it; but it was for the jury to weigh his testimony in connection with the circumstances shown by the State. In *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489, this court said:

"The other assignments of error all go to the effect that the evidence was not sufficient to justify the verdict. An examination of the evidence in the case impresses us with the fact that it was not very strong, and that the jury might reasonably, in the opinion of this court, have found the defendant not guilty; but there was sufficient evidence, if uncontradicted, to warrant the jury in bringing in a verdict of guilty, and, the jury being the tribunal upon which, by our laws and constitution, is especially imposed the duty of weighing the testimony, and having so weighed the testimony and found against the defendant, it is not the province of this court to disturb their verdict."

Appellants cite *State v. Morgan*, 21 Wash. 355, 58 Pac. 215, in support of this assignment of error. In that case the information charged all the defendants directly with breaking and entering the house. The court says, "There was no testimony tending to show that appellant was present when the crime was committed." The trial court instructed the jury that, if the appellant was absent, and by counsel or understanding between himself and the person or persons who did make the entry assisted therein, they should find him guilty. It was held that, as

the information did not charge the appellant with aiding and assisting, but did charge him directly with breaking and entering, there was a fatal variance between the charge and proof by reason of the provision of the statute (section 6842, Ballinger's Ann. Codes & St.), as follows:

"The indictment or information must be direct and certain as it regards * * * the particular circumstances of the crime charged."

The opinion followed the rule announced in *State v. Gifford*, 19 Wash. 464, 53 Pac. 709 (11 Amer. Crim. Rep. 13) also cited by appellants, to the effect that one charged with the crime of committing rape could not be convicted as a mere accessory, but that, to place him upon trial as an accessory, he must be charged with the crime of rape, "committed as follows: By procuring," etc., followed by a statement of the facts the accused is expected to meet. The cases therefore do not seem to be in point here. There is no charge in the information or claim in the testimony that appellants were only accessories. The charge was that of a breaking and entering, and, while there is no direct evidence of the fact that appellants did break and enter, yet certain circumstances relied upon to show that appellants were actually present at the time of the burglary were submitted to the jury, and it was a fact for them to determine whether appellants did break and enter. By their verdict they found such to be the fact. It is seldom that direct proof that the accused persons broke and entered can be had, but circumstances often lead to the finding by the jury that such is the fact. It is within their province to so find if they believe it to be true from a chain of circumstances which renders it possible to have been true.

It is also assigned as error that the court permitted the following question and answer over objection: "Question. He showed no curiosity to find out what he was arrested for? Answer. No, sir; he did not seem to." This may have been technically erroneous, was calling for a conclusion; and while the more proper course would have been to ask what the appellant did, and leave the jury to determine as to what, if any, curiosity was shown, yet we do not believe it was such material error as was prejudicial

to appellants, and such as would justify a reversal of the judgment.

The judgment is therefore affirmed.

REAVIS, C. J., and MOUNT, FULLERTON, WHITE, and DUNBAR, JJ., concur.

BUNDICK v. COMMONWEALTH.

97 Va. 783—34 S. E. Rep. 454.

Decided November 23, 1899.

BURGLARY—CIRCUMSTANTIAL EVIDENCE: *Insufficiency of the evidence—Circumstantial evidence to be acted on with the utmost caution.*

1. A dwelling house was entered in the night-time and money and bonds carried away. Footprints near the window entered were not shown to be those of the accused. The only circumstance in evidence to connect the accused with the burglary was the finding of a pocket knife in the dining room of the burglarized house, which two witnesses identified as the knife of the accused; but there was nothing to particularize the knife from any other knife. Held,—insufficient to sustain the conviction.
2. It is not sufficient that evidence creates a suspicion of guilt; but to warrant a conviction, "every fact necessary to establish his guilt must be proved beyond a reasonable doubt; and especially is this so where, as here, a conviction is sought on circumstantial evidence alone, which is always to be acted on with the utmost caution."

Supreme Court of Appeals of Virginia.

Error to a judgment of the Circuit Court of Northampton County, rendered April 20, 1899, affirming the judgment of the County Court of said county, by which the plaintiff in error was sentenced to the penitentiary for fifteen years for burglary. Reversed.

E. J. Spady, for the plaintiff in error.

A. J. Montague, Attorney General, for the defendant in error.

CARDWELL, J. Robert Bundick, along with his wife, Catherine Bundick, was indicted in the County Court of Northampton County for entering the dwelling house of one John W. Tankard in the night-time of January 24, 1899 and taking, stealing, and carrying away certain money and bonds of said Tankard, and upon his trial was found guilty, and sentenced to the penitentiary for

fifteen years. He thereupon applied for a writ of error to the Circuit Court of Northhampton County, which was awarded, and upon a hearing, the judgment of the County Court was affirmed, and the case is now before us upon a writ of error awarded by one of the judges of this court.

The sole question to be considered is whether the facts proved, as certified in the record, warrant the conviction; in other words, is the evidence plainly insufficient to sustain the verdict of the jury?

While there were footprints of several persons found at and around the window through which the guilty parties entered the dining room in the residence of Mr. Tankard, where the burglary was committed, none of them were proven to be the footprints of the plaintiff in error. No footprints were tracked to his house or premises, and none of the money or bonds stolen was found in his possession, although his premises were searched immediately after the offense was committed. The only circumstances, therefore, relied on to sustain the verdict are as follows: A common two-bladed knife was found in the dining room, where the burglary was committed, the next morning after the offense. A witness for the Commonwealth,—Lawrence Johnson,—testified that he believed that he had seen this knife twice before; first saw it at William Johnson's, his brother; that his brother killed hogs on Tuesday, the 10th of January last, and on the next day he (witness) helped to put them in a cart, to send them to the railroad station for shipment, the prisoner and witness' nephew, Charles Dewar, taking them to the station in the cart; that while witness was standing at the cart he borrowed a knife from the prisoner, and cut a rope, looked at it, turned it over in his hand, and thought of driving a trade with the prisoner for it; put it in his pocket, and afterwards, finding he had the knife in his pocket, he called prisoner, and gave it to him. Witness next saw the knife at the examination of prisoner and his wife, Catherine, at Exmore. There was nothing special about the knife that caused witness to rivet his attention on the make-up of the knife. He could not tell that knife from another out of the same paper unless there was some difference in color or use. He saw no mark upon the knife. He believed it was the same knife. He could not tell it from one precisely like it. It looked about the point as if it had had some hard service, but he (witness) could not swear

that it was the same knife handed him by the prisoner, as witness did not look at it expecting to be called upon to identify it again, the burglary not then having been committed. He opened only the big blade of the knife. Did not know whether the little blade was broken or not. He did not know whether the mounting on it was of white or yellow metal, but he had no doubt it was the same knife.

Another witness for the Commonwealth,—Charles Dewer,—says he was acquainted with prisoner; saw him have a knife, and lend it to Lawrence Johnson, which was the only time witness remembers seeing prisoner have a knife. The day after the burglary witness wanted a knife to cut a gun-rod, and asked prisoner to lend him one, and was told by him that he had lost his knife.

To warrant the conviction of a person accused of crime, every fact necessary to establish his guilt must be proved beyond a reasonable doubt; and especially is this so where, as here, a conviction is sought upon circumstantial evidence alone, which is always to be acted on with the utmost caution. It is not sufficient, therefore, that the evidence creates a suspicion of guilt. The accused is entitled to an acquittal unless the fact of guilt is proven to the actual exclusion of every reasonable hypothesis of his innocence. *Prather's Case*, 85 Va. 125, 126, 7 S. E. 178; *Taliaferro's Case*, 77 Va. 411; and *Pryor's Case*, 27 Grat. 1009.

While the evidence in this case is sufficient to create a suspicion of guilt, we are of opinion that it is plainly insufficient to warrant the conviction of the accused.

The judgment complained of must, therefore, be reversed, and the case remanded to the County Court for a new trial.

Note.—Catherine Bundick, the wife of the plaintiff in error, who, as it appears, was jointly indicted with him, was also convicted upon circumstantial evidence, and, obtained a reversal of the conviction. The following is an account of her case;

BUNDICK V. COMMONWEALTH.

97 Va. 787—34 S. E. Rep. 455.

Decided November 23, 1899.

CARDWELL, J. The plaintiff in error, Catherine Bundick, was jointly indicted with her husband, Robert Bundick, in the County Court of Northampton County, for house breaking in the night-time, with intent to commit larceny, and the jury returned a verdict of guilty, and ascertained her punishment at five years confinement in the penitentiary. A motion for a new trial was made, and refused by the County Court; and, upon application to the judge of the Circuit Court of Northampton County a writ of error to the judgment of the County Court was granted, and upon a hearing the judgment of the County Court was affirmed. To this action of the Circuit Court a writ of error was awarded by one of the judges of this court.

The record in this case is the same as that in the case of Robert Bundick (just disposed of by this court) 34 S. E. 454, except there are two exceptions taken to the rulings of the County Court admitting certain evidence introduced on behalf of the Commonwealth, but these exceptions need not be considered, as the case may as well be disposed of upon the question whether or not the evidence is plainly insufficient to sustain the verdict of the jury.

The dwelling house of John W. Tankard, situated in the County of Northampton was entered in the night-time of January 24, 1899, and certain money and bonds taken therefrom. One package of the money consisted of a \$10 note, a \$5 note, and a \$2 note; another package, containing the sum of \$300, consisting of gold and paper money, the latter in denominations not smaller than \$5, was in another pocketbook, and the notes or bonds in still another. Footprints of several persons were found the next morning after the offense on the ground under the window through which entrance was effected into the room containing the secretary from which the money and bonds were taken, and in the opinion of some of the witnesses one of the persons who made these footprints was a woman; but, if it be conceded that this was a fact proved, the evidence utterly fails to establish as a fact that any of the footprints were those of the plaintiff in error.

True, it is shown that she was familiar with the premises of Mr. Tankard, knew where he kept his tools with which an entrance to his dwelling was effected, and knew where he kept his money, she having lived with him as a servant some time prior to December 23, 1898, when she moved to her husband's home, two and one half miles away but it is also shown by Mr. Tankard himself that all the employees about his premises had the same knowledge, and that all persons who worked for him saw him get money from his secretary.

The remaining circumstances relied on to establish guilt of plaintiff in error are; First that a \$2 note was found in her possession, at her house, in her pocketbook, when her house was searched the next day, and

she made conflicting statements as to the source from which she obtained the \$2 note; second, a handkerchief was also found in her house, which proved to be the property of a granddaughter of Mr. Tankard, who lived with him, and some pillow slips, sheets, and, perhaps, other articles of domestic use, the property of Mr. Tankard, were found a short distance from her house.

There is no evidence whatever to show that the handkerchief, pillow slips, &c. were in the house of Mr. Tankard the night it was entered, and his money and bonds taken, and there is the absence of all proof to identify the \$2 note found in the pocketbook of plaintiff in error, as part of the money stolen.

We are therefore of opinion that the evidence in this case is plainly insufficient to sustain the verdict of the jury, and the judgment of the County Court of Northampton County, and of the Circuit Court of said county affirming the same must be reversed and annulled and this court, proceeding to enter such judgment as the Circuit Court should have entered, it is ordered that the said judgment of the County Court be reversed and annulled, and a new trial awarded the plaintiff in error.

Reversed.

STATE V. GRINSTEAD.

62 Kan. 593—64 Pac. Rep. 49.

Decided March 9, 1901.

CHANGE OF VENUE—INFORMATION FOR LIBEL—INSTRUCTIONS: *Prejudice and publications of the accused against the judge, no ground for change of venue—Insufficient information for libel—Erroneous instructions as to the burden of proof.*

1. A defendant in a criminal case is not entitled to a change of venue on account of the prejudice of the judge against him, because he is himself prejudiced in feeling towards the judge, had violently opposed him in a political campaign for his office, had published during and subsequently to such campaign vituperative and libelous newspaper articles against him, calculated to arouse him to feelings of resentment and prejudice, and, by testimony which the judge asserted to be false, had endeavored to secure his removal from office for violations of the act to prohibit corrupt practices at elections, when the judge, notwithstanding all such unfriendly conduct, by statement filed in court disavowed all feelings of prejudice against the defendant, and when there was nothing proved against the judge on the hearing of the motion for change of venue showing bias or prejudice on his part towards the defendant.
 2. An information for the offense of publishing a libel, not defamatory *per se* or injurious on its face, is fatally defective unless it avers
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that the publication tended to produce some of the consequences mentioned in Gen. St. 1899, § 2224,—such as provocation to wrath, exposure to public hatred, deprivation of public confidence, etc.

3. While, in the case of informations for publications of matter not libelous *per se* or defamatory on their face, matters of inducement and innuendo are required, they need not be separated in statement from one another, but may be alleged together in the same part of the information, and together may be allowed to help one another's averments.
4. The following instruction to the jury in a case of criminal prosecution for libel that "it is incumbent on him [the defendant] to satisfy you that it [the libel] was not published with his knowledge or authority, and, unless he has so satisfied you, you should return a verdict of guilty," is erroneous, because throwing upon the defendant the burden of proof of a material matter, and, contrary, to the rule of the reasonable doubt of an accused person's guilt, requiring him to satisfy the jury of his noncomplicity in the crime charged.
(Syllabus by the court.)

Appeal from Court of Appeals, Northern Department, Eastern Division.

Pool Grinstead was convicted of libel but the conviction was reversed by the Court of Appeals. Upon petition by the State the matter is heard by the Supreme Court and the action of the Court of Appeals is affirmed.

A. A. Godard, Attorney General, and *S. M. Brewster*, County Attorney, for the State.

Harvey & Harvey and *Albert H. Horton*, for the appellant.

DOSTER, C. J. This is an appeal from a judgment of conviction of libel. The judgment was reversed by the Court of Appeals upon the grounds: First. Error in overruling an application for a change of venue; second, insufficiency of the information to charge a public offense; third, erroneous instructions to the jury. Upon petition of the State a certification of the case to this court was ordered.

The motion for the change of venue was verified by the appellant's oath, and supported by his oral testimony. Summarized, the motion and testimony were to the following effect: Appellant was the publisher of a newspaper, Republican in politics. In 1898, preceding the nomination of a Republican candidate for judge of the Twenty-Second judicial district, appellant had favored Hon. R. M. Emery, and opposed Hon. W. I. Stuart, as the nominee for that office. The latter received the nomination, but

appellant claimed that it was secured by dishonorable political practices, and through the efforts of one Cyrus Leland, whom he alleged to be a tyrannical and unscrupulous political boss, in disfavor with the better elements of the party, and that the nomination, being thus brought about, was in opposition to the real desires of a majority of the voters of the party. Appellant, notwithstanding his dislike for Stuart and the methods and influences by which his nomination was procured, agreed to support his candidacy in consideration of \$40 in money to be paid by Stuart, and in further consideration of a promise of the latter's influence to secure him a share of the county printing, and also engaged to and did act as an intermediary between him and the editors of some other papers, in arranging terms for their support similar to those which he had made for himself. These latter undertakings appellant complied with, but Stuart broke faith with him in the matter of the county printing and the payment of the money, whereupon he refused to further support his candidacy, and commenced, and did thereafter, violently oppose him through his newspaper. Many of the editorials published by appellant in opposition to Stuart's candidacy were of the most vituperative and libelous character. In them the candidate was accused of "bribery, perjury, drunkenness, gambling, libertinism, and various other forms of human debauchery." Stuart, however, was elected; but the appellant continued the publication of the libelous articles concerning him, speaking of him in some of them as "Judge Anarchist," and in various ways impugning his character and qualifications as a judicial officer. At the legislative session of 1899 the State Senate, in a contest proceeding instituted by James Falloon, Stuart's unsuccessful opponent at the preceding election, found that Stuart had secured his election through a violation of the provisions of chapter 77, Laws 1893, [Gen. Stat. 1897, Ch.; Gen. Stat. 1899, Secs. 2666-2680], "An act to prohibit the corrupt use of money and corrupt practices at elections," whereupon that body declared the office of judge of the Twenty-Second Judicial District to be vacant, and ordered and directed Stuart to vacate the office. In the case of *Falloon v. Clark*, 61 Kan. 121, 58 Pac. 990, the making of this finding and order was held to be beyond the constitutional jurisdiction of the State Senate, and in consequence Judge Stuart retained possession of the office. Upon the hearing of the proceed-

ing in the Senate, appellant appeared as a witness against Judge Stuart and testified to violations by him of the "corrupt practices act," such as offering and paying money and making promises of political influence for political support. As a consequence of appellant's violent opposition to Judge Stuart's election, and the publication of the aforementioned newspaper articles against him, and the testimony given against him on the proceeding in the State Senate, the judge became greatly prejudiced against the appellant, and refused to speak to him when meeting him upon the street or elsewhere, wherefore the application for change of venue was made.

Let it be understood that the above is the appellant's recital of facts. It is not made as a statement of the proved occurrences except as to the publication of the newspaper articles. Upon the trial of the application for change of venue, Judge Stuart filed a written but unverified statement, in which he disclaimed all feeling of prejudice against the appellant. He denied that he had agreed to pay appellant for his support in the political campaign, either by promises of money or influence to secure the public printing; denied that he had authorized him to negotiate for the support of other newspapers by promises of money or otherwise, and denied generally that he was guilty of any of the corrupt practices charged against him by appellant during the campaign. He said that he had read some of the appellant's newspaper articles, but had not read all of them; that those he had read excited in him no feelings of prejudice or animosity; that he attributed their publication to feelings engendered by the heat of the political campaign, and therefore did not attach any importance to them. He denied that he had refused to speak to appellant when spoken to by him. He admitted, however, that he had not spoken to him, but said that he supposed that appellant had no desire, considering the incidents of the previous campaign, to communicate with or speak to him. Three or four persons filed affidavits in resistance of the application for a change of venue, stating in general terms that they were acquainted with Judge Stuart, and never heard him speak or manifest ill will or prejudice towards appellant, and from their knowledge of the character and disposition of the judge, they believed he had no prejudice against appellant, and could give him a fair and impartial trial. The above, including the judge's written statement,

was all the evidence on the application for change of venue. In the view of the majority of the court, no error was committed in overruling the application. The showing of reasons for the change of venue was no stronger than was made in *City of Emporia v. Volmer*, 12 Kan. 622. In that case, as recited in the opinion:

"Volmer filed his affidavit in the District Court for a change of venue on account of the prejudice of the judge, setting out that the judge had some two years before, and in his presence, speaking of him and to him, remarked that he was meaner than a horse thief, a murderer, or a rebel; that he had no shame; if he had, he (the judge) would make his face burn,—and that there had since that time been no reconciliation between them. Whereupon the judge filed a counter affidavit, stating, in substance, that he did not recollect the remarks; thought he did not make them; but, if he did, it was while a partner of the city attorney, and engaged in the trial of a prosecution against said Volmer for violating a city ordinance; that he had no prejudice against defendant; that they had been in the habit of meeting and speaking together in a friendly manner, and until the reading of defendant's affidavit he was unaware that any other but friendly relations existed between them. Upon this the defendant asked time to file counter affidavits, but the court refused to grant any, and overruled the application for a change of venue. Was there error in this ruling? It must be confessed that it is somewhat novel for a judge to file his own affidavit, to be used on a motion before himself, but the novelty or irregularity, if irregularity it be, of such proceeding, does not warrant us in a reversal, if outside and independent of it the substantial rights of the defendant have not been prejudiced."

In that case it was ruled that the personal knowledge of the judge as to the existence of bias or prejudice in his mind against the defendant, and his statement of it upon the consideration of the application for the change of venue, could not be ignored, and it was therefore held that a reviewing court must consider the judge's statement in passing upon the sufficiency of the evidence in support of the application. After a full consideration of the question, it was ruled by the court, as expressed in the syllabus of that case:

"In criminal cases, on an application for a change of venue on

account of the prejudice of the judge, such facts and circumstances must be shown by affidavits or other evidence as clearly established such prejudice; and, unless it be by such testimony clearly established, a reviewing court will sustain an overruling of the application on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged."

A similar ruling was subsequently made in the case of *State v. Bohan*, 19 Kan. 28. The facts of the two cases to which we have thus adverted are, indeed, stronger in support of the contention made by the defendants in those cases than are the facts in support of the appellant's contention in this case, because in these cases the evidence in support of the application consisted of expressions of dislike and ill will of the defendants made by the judge. In this case the evidence consisted of expressions of dislike and ill will of the judge made by the appellant. In those cases it was the judge who had expressed ill will of the defendants. In this case it was the appellant who had expressed ill will of the judge. Before a reviewing court can hold that a judge had erred in refusing a change of venue upon the ground of his bias and prejudice against a party, it must appear that it is the judge who is prejudiced against the party and not that it is the party who is prejudiced against the judge.

I take leave to say that the above is the opinion of a majority of my associates. It is not my own opinion. I dissent from it, and am authorized to say that Justices GREENE and POLLOCK likewise dissent. In the case of *City of Emporia v. Volmer*, *supra*, it will be observed, by the quotation made from the opinion, that the judge denied speaking the words of prejudice and ill will attributed to him by the defendant, but said that, if perchance he did make them, it was as an attorney, while engaged in the trial of a criminal prosecution against the defendant; and he further stated that since then he and the defendant had been in the habit of meeting and speaking together in a friendly manner. In *State v. Bohan*, *supra*, the judge quite satisfactorily showed that he did not use the language imputed to him by the defendant; that any criticism he may have made of defendant was by way of comment made by him, as a judge, upon evidence adduced in court tending to show the defendant's guilt of a criminal charge. The record of appellant's trial before

Judge Stuart is not before us as a whole. In fact, there is very little of it before us; but I take leave to say that, judging by the part that is before us, the appellant does not appear to have been harshly dealt with, but, on the contrary, appears to have been tried in a fair and impartial manner. However, his right to a change of venue is not to be determined from the fact that after it had been denied he received a fair and impartial trial, but from the showing made by him in support of his application.

Now, I grant that, so far as the development of actual facts was concerned, the showing was of prejudice of the appellant, and not of prejudice of the judge; but I base my dissent upon the ground that it was too difficult for Judge Stuart to remain unbiased and unprejudiced against the appellant, in view of the vituperative and libelous character of the newspaper articles published concerning him. Judges have the frailties and passions of ordinary mortals, and no judge can be as grossly libeled as appellant libeled Judge Stuart without being excited to feelings of resentment and ill will. He may strive against it, he may not be conscious of it, he may possibly overcome it; but the policy of law should be to relieve a judge from the embarrassment of sitting in judgment upon the case of one who had so vilely traduced his character as a man and his integrity as a magistrate, and it should in such case compel the avoidance of possible wrongdoing. The policy of the law should be to prevent the necessity of a judge struggling to overcome his natural and just feelings of resentment against one who had, as in this case, and in the public manner described, aspersed his character, and who, by testimony which the judge declared was perjured, had also sought to deprive him of an honorable and lucrative public trust. It is the existence of prejudice to be overcome that disqualifies a judge from sitting. It is not the ability to overcome it which qualifies a judge to sit.

The information in this case was in the following language:

"I, S. M. Brewster, the undersigned County Attorney of Doniphan County, in the State of Kansas, who prosecute for and in behalf of the State of Kansas in all courts sitting in and for said Doniphan County, and duly empowered to inform of offenses committed in said county, in the name, by the authority, and on behalf of the State of Kansas, come now here and give the court to understand and be informed that on or about the

5th day of August, 1899, at the County of Doniphan and State of Kansas, one Pool Grinstead was the editor and publisher, in said Doniphan County, of a weekly newspaper called the 'Wathena Star;' that on or about the said 5th day of August, 1899, in the said newspaper, in the said Doniphan County, in the State of Kansas, Pool Grinstead, with intent to expose one Albert Perry to hatred and contempt, and to expose him, the said Albert Perry, to public hatred and contempt, and to deprive him, the said Albert Perry, of public confidence, did then and there unlawfully and willfully and maliciously compose and publish, and cause and procure to be composed and published, in said paper, of and concerning said Albert Perry, the following false, malicious, and defamatory and libelous words, to wit: 'With Leland's brother-in-law (meaning thereby the said Albert Perry) as chairman of the Democratic committee (meaning thereby the Democratic committee of Doniphan County, Kansas), even that party was run (meaning the Democratic Party in Doniphan County during the campaign in which the said Albert Perry was chairman of the said Democratic central committee) pretty much as Leland directed (meaning thereby Cyrus Leland, who was a leading Republican in said county, and meaning thereby that the said Albert Perry, who during the time referred to was chairman of the Democratic central committee of Doniphan County, Kansas, as such chairman betrayed the trust and confidence reposed in him by the said Democratic party and its central committee, and that the said Albert Perry, as such chairman, suffered and permitted the said Cyrus Leland to control in the interests of the Republican party the acts of said Albert Perry as such chairman)' to the great injury, scandal, and disgrace of the said Albert Perry, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas."

In the opinion of the majority of the court, the above information is defective. "A libel is the malicious defamation of a person, made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence or social intercourse." [Gen. Stat. 1899, § 2224. Gen. Stat. 1897, ch. 100, Sec. 349.] The information does not allege that the publication of the libel tend-

ed to provoke to wrath or expose to hatred, etc. It avers that the defendant intended that these consequences should be produced, but it does not allege that they were produced. An essential to the commission of libel is its tendency to provoke to wrath or expose to hatred, etc. Not only is its tendency in that respect made an essential by the statute quoted, but it is an essential at common law. (Newell, Defam. 966, 967, et seq.) It often occurs that publications are so grossly libelous on their face as to show their tendency to produce the consequences spoken of in the statute. We may well conclude that a publication which in plain and unambiguous language charges a high degree of moral turpitude is one the natural and necessary tendency of which is to provoke to wrath, or expose to public hatred, or to deprive of the benefits of public confidence, etc.; but there are injurious publications of which it cannot be said that such consequences naturally or necessarily follow. In order to understand that they have followed, an averment to that effect is necessary. The former class are denominated libels *per se*, or libels injurious in themselves.

In the case of libels that upon their face show themselves to be injurious, much explanatory matter otherwise required by the rules of criminal pleading may be dispensed with; but, in the case of publications the injurious character of which is not thus shown upon their face, all of the averments of inducement, innuendo, and consequence must be made. The publication in question belongs to the latter class. As charged in the information and in full, it is only as follows: "With Leland's brother-in-law as chairman of the Democratic committee, even that party was run pretty much as Leland directed." Upon the face of this publication, it is not libelous. Who Leland was, and his relations to political parties, was not stated. For aught that appears upon the fact of this publication, Leland may have been a Democrat, and as such entitled to advise and influence his brother-in-law, the chairman of the Democratic committee. Whoever Leland was, and whatever influence he exerted over his brother-in-law as chairman of the Democratic committee, this publication fails to state that such influence was in any wise to the prejudice of the Democratic committee or the Democratic party. Only by knowing that Leland was not a member of the Democratic party, and therefore in political morals not

justified in exerting an influence upon Democratic committeemen and on Democratic politics, could it be known that his brother-in-law, as chairman of the Democratic committee, was politically derelict or dishonorable in yielding to his influence; therefore only by knowing these things could it be known that the publication of the statement that Leland, through his brother-in-law, as chairman of the Democratic committee, ran the affairs of the Democratic party as he directed, would have a tendency to provoke Perry to wrath, expose him to hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence or social intercourse. The publication upon its face contained no language imputing moral turpitude or political dishonor, and therefore it had no necessary tendency to produce the consequences required by the statute to constitute the offense of libel.

This view of the practice in cases of criminal libel is supported by *Lawton v. Territory*, 9 Okl. 456, 60 Pac. 93; *Moody v. State*, 94 Ala. 42, 10 South. 670. And I think there are no authorities to the contrary. In the case of *State v. Nichols*, 15 Wash. 1, 45 Pac. 647, its application to the case of an information for libel *per se* was rejected, but with a distinct intimation that it would apply in a case where the publication did not of itself import a libelous meaning. Our judgment, therefore, is that the information is fatally defective.

Speaking now for myself, I think the above information is fatally defective in another particular. It is totally lacking in what is called *inducement*. The inducement is that part of an information for a libel not *per se* defamatory which alleges those extrinsic facts which are necessary to explain the meaning of the words used, and to show them to be injurious in effect. [Newell, Defam. 603.] In this case the publication alleged to be libelous cannot be understood without an explanatory statement in the information as to who Leland and Perry were; that the one was a Republican, the other a Democrat, in politics; and such other like matters as would show the impropriety of Leland attempting to influence Perry politically, and the political turpitude of the latter in yielding to the influence of the former. There is an entire absence from this information of that part called the *inducement*. It is said, however, that the lacking matter is supplied in that part of the information which

is called the *innuendo*. The innuendo is that part of the information for libel which explains the defendant's meaning by reference to the antecedent matter alleged in the pleading. It is a statement of the meaning attributable to the words of the publication. The information in this case contained proper innuendoes, as that "Leland's brother-in-law" meant Albert Perry; that "even that party was run pretty much as Leland directed" meant that Leland, who was a Republican in politics, ran the Democratic Party, and that Albert Perry, as chairman of the Democratic committee, betrayed the political trust and confidence reposed in him, etc. But there is no statement by way of *inducement* as to who Leland was, who Perry was, nor the political affiliations or antagonisms of these gentlemen. The authorities are uniform to the effect that an *innuendo* cannot supply the place of an inducement in the pleading of a libel not injurious on its face. [13 Enc. Pl. & Prac. 99-102; Towns. Sland. & L. 336; Bish. New Cr. Proc. §§ 793, 794; Newell, Defam. 618; *State v. Pulitzer*, 12 Mo. App. 6; *Carter v. Andrews*, 16 Pick. 8; *State v. Atkins*, 42 Vt. 253.]

However, the majority of my associates are of the opinion that the rule of pleading in libel which separates matter of *inducement* from matter of *innuendo*, and which assigns different places in the information to its different parts, and which holds an information bad because of an intermixture of the different parts, is too technical for the latter-day liberal view of practice. I think not, and, with much respect to them, I beg to say that their decision goes to the reversal of a well-established, fundamental, and reasonable rule, and that it is, in my judgment, the first of the kind to be made. My associates, however, admit that matters of *inducement* and *innuendo* are still required in informations for publications not libelous *per se*. They only hold that the two may be pleaded together.

The court gave the jury the following instruction:

"There is no dispute in the evidence in this case but that the defendant was, at the time the alleged libelous article was published in said Wathena Star, both editor and publisher of said paper. The law therefore presumes that such publication was by the authority of said defendant, and it is incumbent upon him to satisfy you that it was not published with his knowledge

or authority; and, unless he had satisfied you, you should return a verdict of guilty in this case."

The latter portion of this instruction is erroneous. It not only shifted the burden of proof from the State to the defendant, but required the defendant to satisfy the jury that the publication was not made by his authority. It is elementary that the burden of proof as to all essentials of guilt rests upon the State, and not upon the defendant, and that burden must be discharged by a degree of evidence that will satisfy the jury beyond a reasonable doubt. The above instruction, in the particular mentioned, reversed the rule, and required the defendant to satisfy the jury that the libelous publication was not made by his authority; and we do not regard such instruction as modified, or the error contained in it cured, by any of the others that were given. It may be that the State may rest upon the presumption of authorized publication, growing out of the admitted fact of defendant's ownership and control of the newspaper in which the publication was made, and it may have been incumbent upon the defendant to offer evidence in the first instance to rebut this presumption; but it is not incumbent upon him, in the doing of it, to satisfy the jury of his lack of guilt in the particular mentioned. If he were required to take the initiative in the introduction of testimony, he was only required to introduce such testimony as would raise a reasonable doubt of his guilt. We do not, of course, hold that it was incumbent upon him to introduce testimony in his defense in order to raise a reasonable doubt of his guilt. It is not the rule that a defendant should first introduce testimony in disproof of any element of the crime charged. The rule is that accused persons are presumed innocent until such presumption is dispelled by convincing proof of guilt arising out of all the evidence in the case, by whomsoever offered, in connection with all the presumptions legally applicable. [*State v. Crawford*, 11 Kan. 32.]

For the error in giving the instruction above quoted, and for error in overruling the motion to quash the information for the defect in it first herein pointed out, the judgment of the District Court is reversed, and that of the Court of Appeals is affirmed, and such proceedings will be had in the District Court as may be consistent with this opinion.

DOSTER, C. J., dissenting from first and third paragraphs of syllabus and corresponding portion of opinion.

GREEN and POLLOCK, JJ., dissenting from first paragraph of syllabus, and corresponding portion of opinion.

SMITH, J., dissents.

JOHNSTON, J. (dissenting). A judge is never justified in granting a change of venue, except for some of the grounds prescribed in the statute. The prejudice of a party against a judge is not a cause for change, but it is the prejudice of the judge that disqualifies him to try a case. That prejudice must not only exist, but it must be shown to exist, before the court is warranted in allowing a change; and a reviewing court cannot say that error is committed in refusing the change on account of prejudice unless the evidence in the record clearly establishes the prejudice of the judge. [Gen. Stat. 1899, § 5423; Gen. Stat. 1897 ch. 102, § 173; *City of Emporia v. Volmer*, 12 Kan. 622; *State v. Bohan*, 19 Kan. 28.] If the opposite view was taken, all that would be necessary for a party to do to obtain a change of venue, and thus secure postponement and delay, would be to speak disrespectfully of the judge, or to criticise and censure him, and then appear before the court and demand a change,—a very dangerous precedent to establish. It is safer to adhere to the rule of the statute which requires a showing of prejudice of the judge, and in the present case there is an entire absence of evidence tending to show prejudice on his part towards the defendant.

In my opinion, the information states an offense, and the court decided correctly in overruling the motion to quash. It is said to be defective because it did not, in terms, expressly allege that the publication tended to provoke Albert Perry to wrath or expose him to public hatred, etc. It did allege that the publication was made with intent to expose Albert Perry to hatred and contempt, and to deprive him of public confidence, etc. The Criminal Code provides that an information which contains the title of the cause, the names of the court and of the parties, and "a statement of the facts constituting the offense, in plain and concise language, without repetition" is sufficient. The facts narrated in this information certainly show that the publication against Perry was defamatory and libelous. It not

only alleges that the libel was intended to expose Perry to public hatred and contempt, but upon its face it shows that it could have no other effect. A statement that it tended to expose him to public hatred and contempt would be no more than a conclusion, and no more than is clearly apparent from the averments of the information. Again, the information, in terms that cannot be misunderstood, charges Perry with fraud and dishonesty; and where the publication is *prima facie* libelous, and would necessarily expose him to public hatred and contempt and deprive him of public confidence, an additional averment that such is the effect of the publication is the pleading of a conclusion that is unnecessary. The question was directly involved and decided in *State v. Nichols*, 15 Wash. 1, 45 Pac. 647, where it was held that an information substantially similar to the one under consideration, and which omitted the phrase "tending to expose," etc., was not fatally defective.

The objectionable instruction is not a sufficient ground for reversal. The judge did not by the inapt use of the word "satisfy" intend to change the burden of proof, nor do I think that the jury so understood him. In other instructions, and in clear and forceful language, the jury were told that the burden of proof rested upon the State in the trial; that it never shifted from the State to the defendant; that it rested upon the State to prove every ingredient of the offense, and, if it failed to so prove any material fact, there must be an acquittal. In six different instructions the court also stated the doctrine of reasonable doubt, and plainly informed the jury that the *onus* was upon the State, and that a reasonable doubt as to any ingredient of the offense or as to the defendant's guilt entitled him to a verdict of acquittal. As the instructions so given in close connection with the faulty one repeatedly enforced the view that the burden remained upon the State, and that a reasonable doubt as to any essential feature of the case would operate to acquit, the use of the word "satisfy," although subject to criticism, must have been understood only to require of the defendant that he introduce evidence to raise a reasonable doubt as to his knowledge and authority in regard to the publication. The publication was libelous. It was published in a paper of which defendant was both editor and publisher. That it so appeared in his paper was not denied, and the evidence clearly connected

him with the publication, and constituted at least *prima facie* proof that the publication was made with his knowledge and authority. To relieve himself and meet the case so made against him, it devolved upon him to introduce proof that it was done without his knowledge and authority. Instead of using the word "show," or the words "introduce testimony tending to show," the court employed the word "satisfy." It is manifest that the court did not intend to place the burden of proof upon the defendant as to this feature of the case, because almost in the same breath the jury were informed that the burden was upon the State. Nor did it intend that the burden must be discharged by the defendant by a degree of evidence that would satisfy the jury beyond a reasonable doubt, for in close connection with this the jury was informed that a reasonable doubt as to whether the defendant knowingly and willfully made the publication would prevent a conviction. It is conceded that it was incumbent upon the defendant to rebut the presumption resulting from the publication in his paper, and this instruction, when read in connection with the others, only meant that it was incumbent on the defendant to satisfy the jury to such an extent as would enable the jury to say that there was a reasonable doubt as to whether or not he authorized or had knowledge of the publication.

In a strikingly similar case it was held that the inapt use of a word which standing alone might seem to shift the burden of proof was insufficient to warrant a reversal. It was there held that the charge of the court was to be taken as a whole, and was not to be disposed of by a process of dissection, and if, when so taken, the jury could not have gained an incorrect impression as to the burden of proof, the judgment should not be reversed. The conviction in that case was for an offense upon which the severest penalty of the law is visited, and yet the instruction was more faulty than the one under consideration. (*State v. Earnest* 56 Kan. 31, 42 Pac. 359.) The testimony in the case and the rulings thereon are not preserved in the record, but the entire charge of the court which is here indicates the disposition of the court to give the defendant a fair trial, and we see nothing in the record which justifies a reversal.

I am authorized to say that Justice SMITH joins in dissenting from the judgment of reversal.

CUNNINGHAM, J. (dissenting). I agree with Justice JOHNSTON in his view of the matters contained in the fourth division of the syllabus, and corresponding portion of the opinion, and join in his dissent therefrom.

PEOPLE V. SUESSER.

132 Cal. 631—64 Pac. Rep. 1635.

Decided May 9, 1901.

CHANGE OF VENUE: *The sheriff, a very popular young man, killed by dissolute idler—Intense indignation throughout the county—Necessity for a fair trial by an impartial jury.*

1. A defendant accused of murder is entitled to a change of the place of trial, where it appears that a fair and impartial trial by an unbiased jury cannot be had in the county in which the homicide occurred, by reason of the coercion of public opinion throughout the county against the defendant, by means of published statements of facts from witnesses, and published commendations of the deceased and denunciations of the defendant, made in the church pulpits and newspapers published throughout the county, so that the people of the county were practically unanimous in the opinion that the defendant deserved the punishment of death.
2. A fair trial cannot be had, except by an unbiased jury; and jurors who have an opinion that the defendant is guilty, which it would require evidence to remove, are disqualified, no matter what was the source of their knowledge of the facts of the case. The discretion given in applying the test whether newspaper reports preclude the impartiality of the juror, is not intended to deprive the defendant of the right to be tried by a jury which is in fact unprejudiced.

In Bank. Appeal from Superior Court, Monterey County; Hon. N. A. Dorn, Judge.

George Suesser, convicted of murder in the first degree, appeals. Reversed.

Dougherty & Lacey, for the appellant.

Tirey L. Ford, Attorney General, and *H. A. Melvin*, for the people.

TEMPLE, J. The defendant was tried and convicted of murder in the first degree, and sentenced to be hanged, and has appealed from the judgment and from an order refusing a new trial.

The principal point relied upon for a reversal is the refusal

of the court to grant a change of venue upon the showing made by the defendant. Section 1033, of the Penal Code, directs the trial court to grant the change when it is made to appear that a fair and impartial trial cannot be had in the county, and when from any cause no jury can be obtained in the county where the action is pending. So far as this case is concerned, both provisions mean the same thing. A fair trial cannot be had where an unbiased jury cannot be had, and a juror who has an unqualified opinion that defendant is guilty, founded upon a knowledge of material facts of the case, does not possess the common-law qualifications for a juror, and it does not matter how that knowledge was obtained, provided the juror believed it. Indeed, the rule went beyond this: A juror was disqualified if he had made positive and unqualified statements in regard to the guilt of the defendant; and to suppose that the majority of mankind would or could act as freely, in the face of such statements made to neighbors and friends, as he could have done if such statements had not been made, is to ignore human nature. It was said in *People v. Wong Ark*, 96 Cal. 136, 30 Pac. 1115: "And when the Constitution of this State guaranties to all the right of trial by jury, it means an impartial jury. It guaranties a common-law jury. Cooley, Const. Lim. 390; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. It is true that this test as to whether a proposed juror is impartial, and can try a cause uninfluenced by rumors and newspaper accounts, has been modified, and much is now left to the discretion of the trial court, but it is not intended by this to deprive any one of the right to be tried by a jury which is in fact unprejudiced. No more now than formerly is a defendant compelled to submit his case to a juror who has such an opinion of his guilt as will require evidence to remove, and thus unjustly add to the burden of his defense. The force of this suggestion will be appreciated, if we suppose the prejudice to have been the other way. Suppose the deceased, instead of being killed, had slain the defendant, and without just excuse, and this same demonstration had been made in his favor; all the newspapers, we may suppose, filled with denunciations of the deceased and commendations of his slayer; and suppose the jurors, when called one by one, all, or nearly all, as in this case, had testified that

they had formed strong opinions from what they had read and heard in favor of the prisoner, and if taken as jurors would commence the trial with opinions in favor of the defendant, which it would take evidence to remove, and yet each juror should testify that he could fairly try the defendant and determine the case uninfluenced by his opinion. Could any one believe that a verdict of guilty could be obtained from such a jury? The very atmosphere pervading the community would forbid it. And yet the coercion of public opinion is a thousand times stronger in this than it would have been in the case supposed.

The defendant, to say the least, was a person of no consideration in the community. He had been arrested before for trifling offenses. He is said to have been an idler, addicted to drink. He made his living principally by hunting. He had been arrested on a charge of petit larceny, made by one Delaney. In the evening of September 18, 1899, he went to the dwelling house of Delaney at Salinas, and, calling him to the door, assaulted him. He afterwards fired several shots at the house, and set fire to a haystack on the premises. A fire alarm was turned in, and naturally the people were much excited.

The deceased was sheriff of the county, a young man much esteemed. It is said he was the most popular man in the county. Upon hearing the alarm of fire, and upon learning something in regard to the conduct of Suesser, the sheriff went, with others, to prevent further trouble. Whether he at first designed to arrest Suesser does not appear. Going to the house of Suesser's parents, they found Suesser with a gun, and his parents and sisters trying to persuade him to remain at home. They heard Suesser, with an oath, declare that he would go and kill some person, probably Delaney, or Allen, who had served a warrant upon him. The sheriff addressed him, saying, "No, you won't," and advised him to remain at home. He asked him, "Do you know me, George?" Defendant replied, with a vulgar oath: "Yes; and I will shoot you, too." The sheriff then said: "George, behave yourself. I will shoot. I will shoot." Suesser immediately fired, killing Farley.

The affidavits upon which the motion for a change of venue was based state that the homicide was in the presence of several persons, who have detailed the occurrence for the public press, and such reports have been circulated throughout the country.

Upon the arrest of defendant, which was shortly after the homicide, a large concourse of people gathered on the streets, which was composed of citizens of standing and repute. These openly threatened to lynch the defendant, and he was saved from mob violence by hurrying him in a carriage at breakneck speed through the streets of the city, and before reaching the jail the officers were met by another crowd bent upon violence, who were defeated only by dashing into a side street, and going out of the city. In the morning early the prisoner was secretly lodged in jail, around which a crowd gathered, who threatened to break into the jail and hang the defendant. Fearing this, the officers clandestinely removed defendant from the county. He was brought back for a preliminary examination on October 11th, and the examination was held at the sheriff's office, rather than at the office of the justice of the peace, for fear of further violence. And "that the defendant has been denounced in the church pulpits and in the public press, and the opinion is practically unanimous in Monterey County that no punishment but death is deserved by the defendant."

The accounts published in the papers are appended as exhibits. Their nature is not overstated in the affidavits. It was natural that the greatest indignation and sorrow should be expressed. Their sheriff was killed in the performance of his duty,—in fact, in protecting the people of the city from the acts of an incendiary, who, while the fire set by him was still raging, was heard to declare his intention to take the life of a citizen. First vainly attempting to persuade the defendant, as was reported, to remain at home, and to abandon his homicidal intent, he endeavors to make the arrest. He was then shot down in the presence of several citizens by this, as represented, most desperate criminal.

Many affidavits and considerable testimony was submitted by the defense, and there was a counter showing. This amounted to little more than a showing that after the lapse of a few days the excitement abated, and there was no real intent to lynch the defendant; also that there was not so much excitement in the remote parts of the county. That but one opinion in regard to the guilt of the defendant existed throughout the county is admitted. There was no pretense that such opinion had changed, but only that the feeling against the defendant was less intense.

The motion was renewed after the examination of the panel on *voir dire* as to their qualifications, and was again denied. So far as the record shows, if I make a correct estimate, 68 jurors were examined, and all except 8 had formed an opinion as to the guilt of the defendant. So far as appears, all were against the defendant. Of the 8 who had not formed opinions, 2 were excused because opposed to capital punishment, and 1 had not been assessed. This left 5. Perhaps 5 to 60 would not unfairly divide the county between those who had not formed opinions and those who had. In fact, it is hard to understand how any one who had heard the reputed acts, as coming from several eyewitnesses, could fail to form an opinion against the defendant.

Most of the 20 peremptory challenges allowed the defendant were exercised upon proposed jurors who stated upon *voir dire* that, if sworn as jurors, they would take their seats in the box with a strong opinion against the defendant, which it would require evidence—some said strong evidence—to remove. Where such a state of things exists, the defendant cannot have a fair and impartial trial. If the change of venue should not be granted in this case, I think the statute should be repealed. Why courts should hesitate to grant change of venue in a proper case I cannot understand. It seems that many, perhaps most, of the merchants and business men of Salinas, made affidavits of the nature I have stated above to prevent such change. Why? Was it feared the defendant would escape if he were allowed a fair trial? It is suggested that there is undue delay in reaching final judgment. Those who complain of delay have prejudged the case but delays are too often caused by plain disregard of obvious rights of friendless and unpopular defendants.

The Attorney General says the opinions formed by jurors were based upon rumor or newspaper reports; but there never was any real conflict about the occurrences at the time of the homicide. They were not denied. The opinions were therefore based on the facts as developed at the trial. The defendant testified that he was unconscious, and had no memory of what occurred.

Reference is made to the case of *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75. One reason for affirming the order in these cases was that leave was given to

renew the motion when, on an attempt to impanel a jury the state of mind would be shown. Here the motion was so renewed. These cases arose, too, in a populous city, where there were over 300,000 inhabitants. But it will be observed that in each case the writer of the opinion would have been better satisfied if the motion had been granted. I admit that much discretion is left in this matter to the trial court.

There are other questions in the case, but, if it is to be sent back with directions to grant the change of venue, a new trial will necessarily result, and such matters will be unimportant.

The judgment is reversed, and the trial court is directed to grant the motion for a change of venue for the purposes of a new trial, which is ordered.

BEATTY, C. J.; VAN DYKE, J.; HENSHAW, J.; HARRISON, J., concurred.

McFARLAND, J. (concurring). I concur in the judgment and in the opinion of Mr. Justice TEMPLE. It is not improper, however, to say that, while appellant's counsel do not claim that he was not guilty of some crime, they do contend, with at least some plausibility, that he committed the homicide under a state of wild excitement and frenzy produced by causes entirely disconnected with the deceased, and not necessary to be here detailed, which show the absence of that deliberation and premeditation necessary to constitute murder in the *first degree*.

BARNES V. STATE.

Texas Court of Criminal Appeals—59 S. W. Rep. 882.

Decided December 19, 1900.

CHANGE OF VENUE: *Prejudice based on a previous conviction revived and intensified and evidenced by the severity of the verdict—Erroneous instruction.*

1. A very strong prejudice against the accused extending generally over the county since his conviction for burglary about ten years previous to the present case. The charge of murder, for which he was about to be tried, had revived and intensified it. By careful culling of jurors an impartial jury might have been obtained but chances were otherwise. Held, that a change of venue should have been granted.
2. An instruction, not appearing in the opinion, held to be erroneous.

3. The severity of the verdict, when compared with the evidence, indicates that the claim of prejudice was well founded.

Appeal from District Court, Van Zant County; Hon. J. G. Russell, Judge.

H. J. Barnes, convicted of murder in the second degree, appeals. Reversed.

Kearby & Kearby, T. R. Yantis, and F. J. McCord, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at 25 years' confinement in the penitentiary. Motion was made to change the venue. Without collating the facts, it is shown without contradiction that a very strong prejudice existed against appellant, running back since his trial and conviction for a burglary some 10 years prior to this transaction. This prejudice extended generally over the county. The charge of murder in this case seemed to revive and intensify the prejudice against appellant. It is stated in the testimony that defendant might get a fair and impartial trial if the jurors could be culled and particularly selected, but, if selected in the usual way, it would not likely occur that impartial jurors could be selected; in other words, it would be likely that unfair and partial jurors would be obtained. As we understand the testimony bearing on this question the prejudice is stronger than shown in the *Meyers Case*, 39 Tex. Cr. R. 500, 46 S. W. 817. See, also, *Randle v. State*, 34 Tex. Cr. R. 43, 28 S. W. 953; *Gallaher v. Same*, 40 Tex. Cr. R. 296, 50 S. W. 388. (11 Amer. Crim. Rep. 207).

Without going into a detailed statement, we think the evidence was of such a character that the change of venue should have been granted, and because it was not the judgment will be reversed.

The court instructed the jury they might look to the cruelty evidenced by defendant's manner of killing deceased, in passing upon the testimony, under article 720, Pen. Code. As we view the record, this charge was wrong; and we call the court's attention thereto, so it will not arise upon another trial.

The evidence discloses there was some ill will between the parties prior to the immediate difficulty, and that on the morning,

and preceding the difficulty, deceased sent for defendant, who was working on his own farm, and requested that he go to see him (deceased) where he was at work, several hundred yards away, in an adjoining farm. Deceased was the landlord of appellant. Appellant refused to go, and told the messenger if deceased desired to see him he might come to where he was at work. Deceased went to the fence dividing the farms, where appellant at the time was hoeing, and at the request of deceased came to the fence where deceased was. Some words passed, and appellant struck deceased with a hoe. The evidence is somewhat at variance as to whether deceased was standing on his side of the fence at the time the lick was struck, or whether he was getting over the fence, with an open knife in his hand, for the purpose of attacking defendant. The location of the wound would rather indicate the correctness of the latter statement. This was the only lick struck with the hoe, and this evidence comprises the main facts of the case. There is contradictory evidence as to whether appellant crossed the fence and kicked deceased after he had fallen on the ground. Deceased died from the effects of this blow sometime within 24 hours. This evidence, in connection with the heavy verdict rendered, may be also looked to in regard to the change of venue, as well as the charge given by the court with reference to evidence of cruelty, etc., in inflicting what proved to be a mortal wound. The judgment is reversed, and the cause remanded.

OWENS v. STATE.

82 Miss. 31—33 So. Rep. 722.

Decided March 9, 1903.

CHANGE OF VENUE: *Prejudice against defendant because of one homicide may be ground for change of venue upon an indictment for another.*

The homicide in question was an accidental killing by a person not the defendant, in an effort to shoot another person, did not cause much public agitation; but a subsequent one created intense excitement, causing a special term of court to be called, at which the defendant was indicted for each of the homicides. There appeared to be a common motive underlying both of the homicides. Held, that a change of venue should have been granted.

Appeal from the Circuit Court, Lafayette County; Hon. P. H. Lowery, Judge.

Whittington Owens, convicted of murder and sentenced to be hung, appeals. Reversed.

H. D. Stephens and *W. V. Sullivan*, for the appellant.
William Williams Attorney General for the State.

TERRAL, J. The appellant, Whittington Owens, was convicted in the Circuit Court of Lafayette County of the murder of Hampton Williams, and was sentenced to be hanged. From that sentence he takes this appeal.

One of the principal grounds of complaint which he makes is the refusal of the court to grant him a change of venue for the trial of said cause. The present indictment against Owens related to the killing of Hampton Williams, who was accidentally shot and killed by Orlando Lester in the effort to kill Walter Jones. The killing of Williams created but little agitation in the public mind, but the killing of John A. and Hugh Montgomery, two officers of the law, committed not long thereafter, created great excitement. Owens was also indicted for their murder, which was committed in the process of arresting William Mathis, also charged jointly with Owens and Lester in the commission of the offense. Now Hampton Williams was killed in the effort to kill Walter Jones, who was a witness against Lester, Mathis, and Owens, one or all, for the unlawful distillation of spirituous liquors. There seems, therefore, to have been a general connection of purpose in the attempted killing of Walter Jones and the killing of the Montgomerys. The several killings were a part of a scheme to rid Lester, Mathis, and Owens of all prosecution for the unlawful distillation of liquors. All these crimes were committed in Lafayette County, and were there triable according to the rules of law. Upon the killing of the Montgomerys, great agitation arose in the county. The defendant, with others, was arrested and carried to Oxford, the county seat. Great masses of citizens assembled there, and much excitement prevailed. A special term of the Circuit Court was immediately called. Indictments were found against Owens for the murder of the Montgomerys, and for the murder of Hampton Williams. Upon the application of Owens, a change of venue was properly granted to him as to the cases against him for the murder of

the Montgomerys, but his application for a change of venue in the Williams case was overruled.

We are not able to escape the conclusion that all the reasons that support the judgment of the court for a change of venue in the two Montgomery cases exist also in reference to the Williams case. The statute (Code, 1892 § 1411) gives three grounds for a change of venue: (1) A prejudgment of the case; (2) a grudge; and (3) ill will to the defendant. Now it must be admitted that ill will or a grudge to the defendant may grow out of matters not intimately connected with the case, and independent of any relation of the case of the killing of Williams to the cases of the killing of the Montgomerys. We think a change of venue should have been granted. There is yet a close relation between the alleged murder of Williams and the murder of the Montgomerys. If in no other aspect they are closely related, they are very much alike in the evidence offered for the conviction of the defendant. There is no direct proof that Owens was connected with either crime; his relation to each crime is made up of the evidence of Lester and of William Mathis. Therefore, if the excitement and prejudgment of the Montgomery cases existed in these cases, it must have found full and free scope for its operation in the Williams case as soon as the evidence upon which it was based was laid before the court and jury. It is conceded that prejudgment existed in the Montgomery cases, and it existed in these cases merely because Orlando Lester and William Mathis declared him the moving spirit that compassed their death. Why, then, did not this spirit of prejudgment in the public mind catch a new flame as soon as the public saw it had a foundation as potent in the Williams case as it had in the Montgomery cases—a foundation in the one case exactly like the foundation in the other—the murder of Williams and the murder of the Montgomerys having for its purpose a riddance of Mathis, Lester, and Owens, one or all, of any prosecution for unlawfully distilling liquor?

In *Cavanah v. The State*, 56 Miss. 307, it was said that the "undue prejudice" meant by the statute was such as would be likely to be so felt in the jury box as to prevent the accused from having a fair and impartial trial by the evidence and the law. We cannot doubt but that the jury box would have felt the influence of the public prejudgment against Owens in his

trial for the murder of the Montgomerys, and its influence was equally prevalent on his trial in the case before us.

Reversed and remanded

GREER V. COMMONWEALTH.

111 Ky. 93—23 Ky. Law Repr. 489—63 S. W. Rep. 443.

Decided May 29, 1901.

CHANCE OF VENUE—INSTRUCTIONS: *Practice.*

1. Under the statutes of Kentucky:— a petition for change of venue must be preceded by reasonable notice; the petition must be verified by the petitioner and supported by affidavits of two persons who are not counsel for or kin to the petitioner, who state that they are acquainted with public opinion in the county and believe the statements in the petition to be true; the Commonwealth may oppose the motion and the court must hear evidence offered by either side.
2. If the defendant presents the required petition supported by proper affidavits, and no other evidence is introduced a change of venue must be granted. If evidence is heard on both sides, the action of the court will not be disturbed; unless there was an abuse of discretion.
3. The defendant gave three days notice, and offered his verified petition supported by two affidavits as required by the statute; but the court refused to allow the petition to be filed, and did not pass on the motion for change of venue. Held: reversible error.
4. "In testing instructions, every deduction which the jury might have been authorized to make from the testimony, must be assumed as a proven fact."—Two instructions very briefly reviewed and condemned.

Appeal from Circuit Court, Marshall County.

James Greer, convicted of the offense of murder, appeals.
Reversed.

Reed, Greer, Olliver & Reed, for the appellant.

John G. Lovett and R. J. Breckinridge, for appellee.

PAYNTER, C. J. The grand jury returned an indictment against the appellant, charging that he had willfully, feloniously, and with malice aforethought killed John Thomas, by compelling him to drink large and unusual quantities of whiskey and wine, by beating and bruising him, by burning him with fire, by dragging him on the ground with a rope or strap tied around his neck, and by leaving him helpless and exposed to the inclemency of the cold winter night, so he did then and there immediately die.

The court fixed June 25, 1900, for the trial of the case. After that had been done, the appellant gave notice that he would, on the day the case was set for trial, tender his petition and move the court for a change of venue. This notice was served on June 22d, three days before the day fixed for the trial. Pursuant to notice, he tendered a petition asking for a change of venue, and also the affidavits of Philip Darnall, T. R. Riley, and J. M. Cornett, residents of Marshall County, not of kin to nor counsel for defendant, who stated that they were acquainted with the public opinion in Marshall County, and they verily believed the statements in defendant's petition were true. The petition and affidavits contained the statements made essential by the statute, to which we will advert. The court refused to allow the notice, petition, or affidavits to be filed, and never passed upon the motion for a change of venue, nor did it give the defendant an opportunity to offer testimony on the question which would have been raised by the filing of the petition and a denial by the Commonwealth that he was entitled to a change of venue. Section 1109, Kentucky Statutes, makes it the duty of the court to order the trial to be had in some other adjacent county, to which there is no valid objection, if it appears that the defendant cannot have a fair trial in the county where the prosecution is pending; and, if the judge is satisfied that a fair trial cannot be had in the adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had. By the provisions of section 1110, Kentucky Statutes, the application by the defendant must be made by a petition in writing, verified by him; and he must produce and file the affidavits of at least two credible persons, not of kin to nor counsel for defendant, stating that they are acquainted with public opinion of the county, and they verily believe the statements of the petition are true. Under this section reasonable notice in writing must be given. It is further provided in that section that the application must be made, and determined in open court during a regular or called term, and the court shall, on the motion, hear all the witnesses that may be produced by either party, and from the evidence determine whether or not the applicant is entitled to a change of venue. If the defendant gives a reasonable notice of his intended application, and tenders the petition and affidavits required by the statute, and there is no countervailing evidence

offered, he is entitled to a change of venue. It was held in *Higgins v. Com.*, 94 Ky. 54, 14 Ky. Law R. 729, 21 S. W. 231, that, if the defendant files the requisite affidavits, and no witnesses are introduced by either party, he is entitled to a change of venue; and the court has no discretion in the matter. When the defendant makes the application, and the Commonwealth opposes it, it is the duty of the court to hear all the witnesses that may be produced by either party, and from the evidence determine whether or not the change of venue should be made. When the court is trying a motion for a change of venue in the manner provided by the statute, its judgment will not be interfered with, unless the court is satisfied that discretion of the lower court has been abused. *Crockett v. Com.*, 100 Ky. 382, 18 Ky. Law R. 835, 38 S. W. 674. When the petition and affidavits tendered contain the statements which are required by the statute, the court has no discretion to exercise, but it is its duty to permit them to be filed if a sufficient notice of the intended application has been given. The defendant, as a matter of right, was entitled to have his petition and affidavits filed under the circumstances indicated. The statute does not fix the time. We are of the opinion that the notice given of the intended application by the defendant for a change of venue was sufficient. Within three days the Commonwealth's Attorney could have had all the witnesses summoned which were needed on the motion for a change of venue; but if he would indicate, at the time the application was made, that he had not had sufficient time to procure the attendance of witnesses whom he desired on the motion as to a change of venue, the court would exercise a sound discretion in giving time to procure their attendance, and postpone the motion and a trial of the case, if need be. The defendant was entitled to the judgment of the court upon the motion for a change of venue, and, if it abused its discretion, he was entitled to have the action reviewed by this court. We are of the opinion that the action of the court is a reversible error.

In testing instructions, every deduction which the jury might have been authorized to make from the testimony must be assumed as a proven fact. *Farris v. Com.*, 14 Bush, 362; *Bush v. Com.*, 78 Ky. 268.

If the defendant unlawfully and intentionally killed the deceased, but without malice, he was guilty of voluntary man-

slaughter. The jury might have so found from the facts proven. Therefore we are of the opinion that the court should have given an instruction on voluntary manslaughter, drawn to suit the facts which were proven in the case.

We think the first instruction to the jury was unnecessary, as it simply attempted to state an abstract principle of law, and should be omitted on the next trial.

In the second instruction the court told the jury that, "if you shall believe from the evidence and circumstances proven in the case," etc. The word "circumstances" should be omitted from the instruction because the evidence which is permitted to go to a jury may be parol, documentary, and circumstantial, all of which is embraced in the word "evidence," which is ordinarily used in an instruction. To use the word "circumstances" might be misleading to the jury, and therefore it is best to omit it. We do not say whether or not this case should be reversed by reason of the fact that instruction No. 1 was given, or because the word "circumstances" was used in the second instruction.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH V. RONEMUS ET. AL.

205 Pa. St. 420—54 Atl. Rep. 1095.

Decided April 27, 1903.

CHANGE OF VENUE—CERTIORARI: *Petition for change of venue, granted by the presiding judge; but reconsidered and denied by his two associate judges—Supreme Court hears the matter on a writ of certiorari, and orders that the change of venue be had.*

A petition for change of venue, showing sufficient reasons, on account of public prejudice and excitement growing out of labor troubles, was granted by the presiding judge; but two weeks afterwards, his two associated judges, not learned in the law, reconsidered the matter, and, denied the petition for change of venue. A petition for the writ of certiorari was then presented to the Supreme Court, which held:

1. While the writ of certiorari is not strictly an original proceeding, it is nevertheless one of supervisory power, in the interests of justice, according to the facts of the case, and, that when it clearly appears that a fair trial cannot be had in the county where the indictment was found, the writ will issue and, the case be sent to another county for trial.

2. That the facts, as they appear in this record, show a clear case for a change of venue, and, it is ordered accordingly.

Supreme Court of Pennsylvania. *Certiorari* to the Court of Oyer and Terminer of Carbon County.

William Ronemus and Henry McElmoyle indicted for murder applied for a change of venue, which was granted by the presiding judge; but which was subsequently denied by the two associate judges. Petition for writ of *certiorari* sustained, and change of venue allowed.

The petition was as follows:

The petition of the defendants above named respectfully represents:—

That on October 15, 1902, indictments charging the defendants with murder were found by the grand inquest in and for the County of Carbon, in the Commonwealth of Pennsylvania, to No. 6, October term, 1902. That the trial upon the said indictments is set down for the term of Court of Oyer and Terminer in and for said county beginning January 12, 1903.

That on October 17, 1902, your petitioners presented their petition to the Honorable, the judges of the said court, alleging that a fair and impartial trial could not be obtained in the said county by reason of the undue excitement, prejudice, and combination existing against them, and praying that a change of venue should be granted.

That on December 15, 1902, the Hon. Horace Heydt, president judge of the said court, by opinion filed, granted the prayer of the said petition, directing a change of venue transferring the trial of the said case to the Court of Oyer and Terminer of Lehigh County, Pa.

That on December 29, 1902, the Hon. E. P. Williams and the Hon. E. R. Enbody, associate judges of the said court, unlearned in the law, filed a written opinion in which the prayer of the defendants' petition for a change of venue was refused.

That a large part of the citizens who serve as jurors in said county are employed in the mining, preparing, and shipping of anthracite coal.

That a large proportion of the men so employed are members of a labor organization called the "United Mine Workers of America."

That Patrick Sharp, for the murder of whom the petitioners are charged in the above-named indictment, was a recognized leader of the United Mine Workers, and was active in fomenting riot, strife, and dissension during the period of the coal miners' strike, and in arousing hatred and prejudice against nonunion men, and particularly against those who in any way aided in protecting coal properties from damage and destruction.

That petitioners are not members of the Mine Workers' Union, and at the time of the death of Patrick Sharp were employed by the Lehigh Coal & Navigation Company in protecting their properties, and by reason of the said employment incurred the hatred and ill-will of the members of the said union and of those affiliating and in sympathy with them.

That in the said County of Carbon there are many other labor organizations containing a large membership, who during the said strike sympathized with and contributed to the support of the members of the miners' union and their families.

That during the strike the nonunion men and those engaged in protecting the coal properties were threatened, abused, and ill-treated in their homes, and while attending religious services upon the Sabbath, and upon the highways.

That so great was the excitement and disorder in the mining region of Carbon County that the sheriff was unable to maintain order and was obliged to call upon the Governor of the State to send troops to protect life and property.

That this hatred and prejudice against nonunion men by the members of the union extended to their neighbors, relatives, friends, and the members of other labor organizations throughout the county, and still continues to exist.

Your petitioners therefore allege that under existing conditions they cannot have a fair and impartial trial upon the above indictment in the County of Carbon, because of the undue excitement in said county, and the prejudice and combination against them, not only on the part of the public generally, but by the jurors likely to be called for the trial of the case: pray:

(1) That a rule may be granted upon the Commonwealth of Pennsylvania, to be served upon the District Attorney of the County of Carbon, to show cause why a writ of *certiorari* should not be granted to bring into this court a certain indictment and proceedings connected therewith now pending in the Court of

Oyer and Terminer in said County of Carbon, No. 6, October term, 1902.

(2) That the decree entered on December 29, 1902, by the said associate judges be vacated and set aside.

(3) That your honorable court will thereupon order a change of venue in said case to some adjoining and convenient county, where the causes alleged in said petition do not exist.

(4) That all proceedings on the said indictment in the Court of Oyer and Terminer of the said County of Carbon be stayed until further order of this court, and they will ever pray:—

1. That a rule may be granted upon the Commonwealth of Pennsylvania to be served upon the District Attorney of the County of Carbon, to show cause why a writ of *certiorari* should not be granted to bring into this court a certain indictment and proceedings connected therewith now pending in the Court of Oyer and Terminer in said County of Carbon, No. 6, October term, 1902.

2. That the decree entered on December 29, 1902, by the said associate judges be vacated and set aside.

3. That your honorable court will thereupon order a change of venue in said case to some adjoining and convenient county where the causes alleged in said petition do not exist.

4. That all proceedings on the said indictment in the Court of Oyer and Terminer of the said County of Carbon be stayed until further order of this court, and they will ever pray.

The findings of fact by Heydt, P. J., are set forth in the opinion of the Supreme Court.

The president judge entered an order that the venue should be changed to Lehigh County. The associate judges, unlearned in the law, dissented from the opinion of the president judge, and entered an order setting aside the order of the present judge and refusing the change of venue.

Argued before MITCHELL, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frederick Bertolette and *Samuel Dickson*, for the petitioners.
Frank P. Sharkey, District Attorney, and *E. M. Mulhearn*, for the Commonwealth.

MITCHELL, J. This is a petition for a *certiorari* to the Court of Oyer and Terminer of Carbon County to remove the record

and proceedings under an indictment in that court for murder against the petitioners, and for an order to change the venue under the act of March 18, 1875, P. L. 30. The authority of this court independently of that act, has been settled by the cases of *Com. v. Balph*, 111 Pa. 365, 3 Atl. 220; *Com. v. Delamater*, 145 Pa. 210, 22 Atl. 1098; *Com. v. Smith*, 185 Pa. 553, 40 Atl. 73; and *Petition of Quay*, 189 Pa. 517, 42 Atl. 199. The petitioners, following the practice indicated in *Com. v. Smith*, *supra*, first filed their petition in the Oyer and Terminer of Carbon County, with the result, after a hearing and consideration by the full court, that the president judge entered of record an order for a change of venue, supporting it by an elaborate opinion on the facts and the law. One of the associate judges expressed his dissent at the time, and two weeks later both the associates joined in an opinion expressing their dissent, and entered an order denying the change of venue.

On this state of facts, set forth in the petition, this court granted a rule to show cause why a *certiorari* should not be allowed on which the record has been returned and is now before us.

Objection is made not only in respect to the irregularity of the judgment entered by the two associate judges after the formal order of record by the president, but also in respect to the authority of the associate judges to sit at all after the constitutional termination of their office by the erection of Carbon County into a separate judicial district. We do not, however, find it necessary to consider any of these questions. The action of this court upon *certiorari* in such cases, while not strictly the exercise of original jurisdiction, is nevertheless one of general supervision in the interest of justice, and is to be governed by our judgment on the facts, so that, as said in *Com. v. Balph*, *supra*, "where it is made clear to us that a man cannot have such a [fair] trial, either from an excited and inflamed condition of the public mind in the county where the indictment was found, * * * or from any other sufficient cause, we shall issue our *certiorari*, remove the record into this court, and send it down to another county for trial."

The facts in the present case are not substantially disputed. They are gathered from a very large number of affidavits and counter affidavits filed in the court below in support and against

the motion for a change of venue, which were elaborately considered and clearly set forth by the president judge in his opinion granting the change. In condensed form his findings are:

(1) That the mining of anthracite coal is one of the most important industries of Carbon County, and the persons engaged in or dependent on such mining represent a large percentage of the total population.

(2) A labor union, known as the United Mine Workers of America, includes in its membership a very large percentage of all the persons employed in and about the mines.

(3) In May, 1902, a general strike was declared by the said labor union, which included the firemen, engineers, and pump runners.

(4) To protect their property from destruction from the accumulation of water, etc., the mine owners and operators employed persons to keep up the fires under the boilers and run the pumps. The petitioners were so employed, not being members of the union, but Patrick Sharp, the person for whose murder they are indicted, was a member of said union.

(5) There are in Carbon County, other labor unions, of men working in other crafts, who were in sympathy with the miners' union and supported the striking miners by contributing money.

(6) The members of all these unions, their neighbors, relatives, and friends, were greatly excited and prejudiced against the petitioners on account of their working at a time when a general strike had been declared.

(7) This general excitement and prejudice had been displayed and promoted by inflammatory articles in the local newspapers, and by sermons and addresses by some ministers, who, forgetting their mission as composers of strife, had disgraced their pulpits by denunciation of those who continued to work.

(8) During the strike, riots and violence were frequent, men who continued at work were threatened, abused, hung in effigy, and their families terrorized, such conduct extending even to the school children. So great did the lawlessness and disorder become that the sheriff of the county was unable to maintain the peace, and on his application the governor had sent troops to preserve order.

(9) The disorder was so great that it invaded the court room, and on two occasions specified the proceedings were interrupted,

and the judge insulted by sympathizers with the union and the strikers.

(10) The learned judge concludes: "This case is *sui generis*. Ordinarily, when a murder is committed, there is a popular indignation by reason of the cruelty of the deed—commiseration for the deceased, or some incident affecting the deceased or the slayer. In the present case there was a popular vindictiveness on the part of the miners, * * * not so much because Patrick Sharp was killed, but because he was killed by 'deputies;' because a union man was killed by nonunion men."

Against this convincing array of facts there is not presented a single denial or even question. The Commonwealth submitted answers "all exactly alike" from certain citizens and electors, setting forth that they have knowledge of the sentiments of jurors and the public generally, "and denying that any such causes for a change of venue exist; but alleging that in their opinion there is no undue excitement against said defendants in said county so as to prevent their obtaining a fair and impartial trial in said county, and there does not exist in said county a prejudice against said defendants such as would prevent their obtaining a fair and impartial trial in said county."

The action of the associate judges is upon the same basis. Their opinion makes no question of the facts, but states that "the petition and the facts alleged therein were fully presented and thoroughly discussed by the counsel for the prisoners, and patiently and carefully heard and considered by each member of this court. The president judge has filed an opinion granting the prayer of the petition; but we, his associates, cannot and do not concur with him, for the reason that, notwithstanding all the allegations of defendants, we are by no means convinced that there exists in this county such undue excitement against the prisoners, or so great a prejudice against them, or any combination against them, instigated by influential persons, by reason of which they cannot obtain a fair and impartial trial in said county."

The opinions of magistrates, qualified by acquaintance with the popular feeling of their vicinity, and formed deliberately under such circumstances, are entitled to respectful consideration. In this case they are neutralized by the opinion of the president judge, formed under the same circumstances, and with the advantages of legal training and experience in observing the subtle

influences that affect the administration of justice. But, while both opinions have received due attention, yet the question before this court is not one of opinion, but of facts, and on the undisputed facts the case admits of but one conclusion; that at the time of the indictment and of the filing of this petition a fair and impartial trial could be had in Carbon County cannot be maintained for a moment. The language of the president judge is again worth quoting: "This is not the ordinary case of homicide. It was committed while the greatest strike in the history of the labor world was progressing. A partial reign of terror existed in the coal region. Labor was arrayed against capital. These defendants were not members of the miners' union and were called 'scabs' and 'deputies' by the strikers, and were working at the time when the miners were out on strike. The masses of the people had arrayed themselves on the one side or the other of the great contest which was being waged. Intense excitement prevailed all through the coal region."

This condition is not altogether ended. The strike is over—whether settled permanently or not is yet uncertain. The excitement may have quieted down, but the antagonisms which produced it are those of conflicting interests, are of long standing, and are permanent in their nature. The passions only slumber, and may break out again at any moment. It is asking too much of credulity to believe that men who did not hesitate at arson and riot and terrorism over women and children will stop now and do their part for a fair and impartial trial in a case where only a few months ago they were clamorous to hang the accused without trial, and carried feeling so far as to insult the court in its public administration of justice. The accused have a right not to be subjected to so small and perilous a chance.

The rule for *certiorari* is made absolute, the order of the associate judges of the Oyer and Terminer refusing a change of venue is vacated; a change of venue granted, and the record is ordered to be certified to the Court of Oyer and Terminer of Montgomery County, with instructions to proceed as if the indictment had been originally found in said county. Said proceedings and trial to be at the expense of the County of Carbon.

STATE v. MANNS.

48 W. Va. 480—37 S. E. Rep. 613.

Decided December 15, 1900.

CHANGE OF VENUE—INSTRUCTIONS: *Prejudice and ill will toward the accused—Public excitement—Misleading instructions—Instructions refused—Grounds for a Continuance.*

1. Known prejudice and ill feeling towards a prisoner, extending over a large portion of the county, owing to his agency and service of process in behalf of certain persons claiming the lands of many residents of such county by superior title, and about which there is much unsettled litigation pending, is good cause for a change of venue, especially during the heat of the excitement engendered by the offense with which the prisoner is charged.
2. Such prejudice, ill feeling, and excitement furnish good grounds for a continuance.
3. Instructions not justified by the evidence and tending to mislead the jury should not be given.
4. Instructions which do not fully state the law on a given point are erroneous and should not be given, as they tend to mislead the jury.
5. While the court may instruct the jury that the burden is on the prisoner to show by a preponderance of evidence that the killing charged was in self-defense, yet it should add thereto, in effect, that such defense may be fully sustained by the evidence for the State, or by all the evidence and circumstances in the case.
6. Instructions asked by the accused, presenting his defense, and which the evidence in any degree tends to support, should be given.
(Syllabus by the court.)

Error to Circuit Court, McDowell County; Hon. Joseph M. Sanders, Judge.

Anthony J. Manns, convicted of murder; error. Reversed.

Flourney, Price & Smith, Strother & Stokes, and Chapman & Gillespie, for the plaintiff in error.

Edgar P. Rucker, Attorney General, and *L. C. Anderson*, for the State.

DENT, J. At the October term, 1899, of the Circuit Court of McDowell County, Anthony J. Manns was indicted and tried for the killing of C. K. Harris in the September previous, and found guilty of murder in the first degree, and sentenced to be hung. The Circuit Court refused him a writ of error. This court granted the same.

The first error assigned is the refusal of the prisoner's appli-

cation for a change of venue. The grounds are that owing to his service of numerous writs as a deputy marshal of the United States Court in connection with certain suits of Henry C. King and Max Lansburg touching large surveys of land, and affecting a large number of claimants, and also his acting as agent for said King and Lansburg, there was a strong public prejudice against him, extending throughout a large portion of McDowell County, which would prevent his getting a fair trial in said county. The testimony of the witnesses fully sustains the existence of this prejudice, although a number of them state that they believe an impartial jury could be found. He further claimed that this prejudice was greatly augmented and aroused by the killing, which was so recent that the excitement caused thereby had not yet subsided. If there is any case in which a change of venue should be had, it is in one of this character. The deep-seated prejudices growing out of these large claims have not only permeated the communities in which such lands are situated, but have been felt far beyond them, and in the County of McDowell, while the excitement over the killing was unabated, would be, though a silent, yet a potential, influence interfering with the impartial administration of justice, and thus denying to the prisoner that fair trial which the law of the land promises him. The depth and extent of such prejudice can never be known from surface indications, but it may secretly extend to the bounds of the county, through sympathy. *State v. Greer*, 22 W. Va. 800; *State v. Douglass*, 41 W. Va. 537, 23 S. E. 724. The same reasons were presented on a motion for a continuance, which the court overruled. The prejudices of the human heart are dangerous things to deal with, especially in times of passion and excitement. Their influences are deadly to right and justice. They breed corruption, false swearing, perjury, persecution, and lawlessness of all kinds. Through them the foulest of crimes have been committed, and man's history by reason thereof is black with many infamous murders committed in the name of justice, and claimed to be under the sanction of the Deity. Where a court has reason to believe that such dangerous prejudices exist, it should move with great caution, and not permit itself to be caught in the whirlpool thereof. The court compelled the prisoner to go to trial within less than one month of the killing, and, as is plainly shown, while the excitement

caused thereby was still at fever heat. The prisoner sought to abate the indictment because of an alleged illegal grand jury, and tried to quash the venire for the petit jury, no doubt seeking any excuse sufficient to secure a continuance. He also objected to certain jurors who had made up and expressed an opinion, and, while it would require evidence to change such opinion, said they could give the prisoner a fair trial. Where prejudice exists, such jurors, to say the least, are dangerous, for they may mean by a fair trial a certain hanging.

On the trial the prisoner sought to prove the dangerous character of the deceased when intoxicated. This the court refused to permit. Yet the evidence tended to show the prisoner did the killing in defense of his home, himself and his family. *Harrison v. Com.*, 79 Va. 374; *Jackson v. Com.*, Va. S. R. Vol. 2, 332, 36 S. E. 487; Whart. Cr. Ev. § 84; 2 Bish. Cr. Proc. §§ 625-629.

It seems hardly necessary to prove that a drunken man armed with a revolver and shooting into the prisoner's house was a person of dangerous character when intoxicated. It is certainly a matter of common knowledge in a civilized community that a man full of "fighting" whisky and armed with a loaded revolver is *per se* a dangerous combination.

There are some other exceptions to the rulings of the court, which are unnecessary to comment on at this time, as they may all be eliminated and avoided, along with the foregoing, in a new trial.

The principal assignment of error calling for consideration relates to the instructions given and refused by the court.

The evidence showed: That Dr. C. K. Harris was intoxicated to a pugnacious degree, and that he began discharging his revolver indiscriminately. That he went in his own house, shooting his revolver. When he reached his office (being a rear room upstairs), he began shooting at Manns' turkeys. Mrs. Manns, coming out of her house, objected, and he turned on her. She fled into the house. Then she and the children, being afraid of Harris, left the house, when he went to the saloons, ostensibly for more whisky. They returned to their house. Mr. Manns, the prisoner, came home about this time, and asked his wife why supper was not ready. She told him she was afraid to get it, on account of Harris' conduct. He got it himself. While they were eating, Harris returned and began shooting again. He

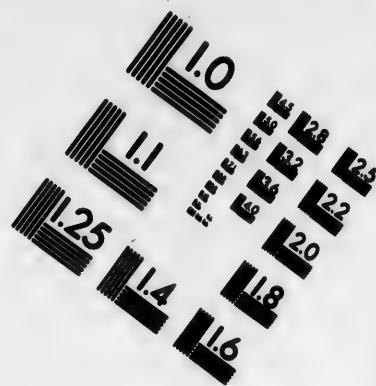
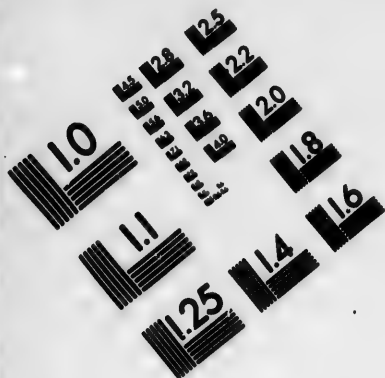
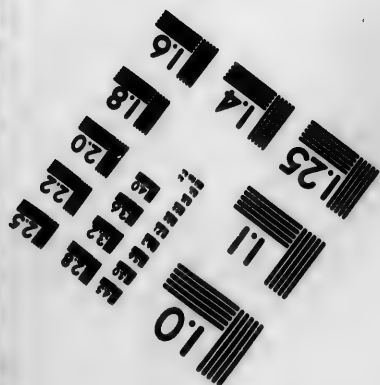
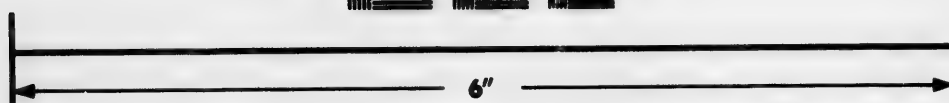
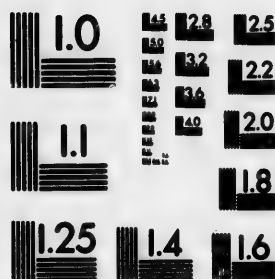


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shot into the house, and the ball caused something to strike Manns' face. He says he thought he was shot. He immediately arose (his family scattering and trying to hide from Harris' shooting), took his revolver in his hand, walked to the corner of the house, and fired the fatal shot. There was also evidence showing that on former occasions Harris, when drunk, had attacked Manns, once in his own house and once in the street, and that there had been ill-feeling between them for some time, giving rise to some threats. On this showing, at the instance of the State, the court gave the following instructions, to which the prisoner objected:

"The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequence of his acts; and if the jury believe from the evidence and all the surrounding circumstances in evidence in this case, and that beyond a reasonable doubt, that the prisoner, A. J. Manns, with a deadly weapon in his possession, without any, or upon very slight, provocation, shot and killed C. K. Harris, alias Dr. Harris, then the prisoner is *prima facie* guilty of willful, deliberate, and premeditated killing, and the necessity rests upon him of showing extenuating circumstances; and unless he proves such extenuating circumstances, or the circumstances appear from the case made by the State, they will find him guilty of murder in the first degree, as charged in the indictment."

"Upon a trial for murder, the use of a deadly weapon being proved, and the prisoner relying on self-defense to excuse him for the use of the weapon, the burden of showing such excuse is on the prisoner; and, to avail him, such defense must be proven by a preponderance of the evidence."

The first is the usual instruction given in almost every case of homicide arising out of a mutual altercation, and it propounds the law properly, when sustained by the evidence; but, when it is in the face of and conflicting with the evidence, it has a tendency to mislead the jury. It uses the language, "without any, or * * * slight, provocation," when the evidence shows that the prisoner was suffering from great provocation. A drunken man, acting in a lawless manner, by shooting a revolver from his house, had scared his wife and her children away from home, and then, when the family were eating their

supper, had begun shooting into the house, towards the table where they were seated; and yet the jury is led to believe that this, if any, is but slight, provocation, in the eyes of the law. Jurors look to the court for advice as to the law, and when the court gives them an instruction they have the right to rely on it as stating the law of the case. What, in law, is deemed slight provocation, they do not know; and, if the court uses the language above, they take it for granted that the provocation, if any at all, was only slight, in law, otherwise the court would not give such an instruction.

An instruction calculated to mislead the jury should be refused. *State v. Greer*, 22 W. Va. 800. "It is error for the trial court to give instructions prejudicial to the accused on the trial of a felony case which are not warranted by the evidence." *State v. Dickey*, 46 W. Va. 319, 33 S. E. 231; *State v. Cross*, 42 W. Va. 253, 24 S. E. 996. If the question had been propounded to the jury, "Do you believe that for a drunken man, in an uncontrollable mood, armed with a dangerous weapon, to shoot into a man's house, among his family, is great provocation?" they would, no doubt, have answered in the affirmative. Yet this is a question of law. The facts being proven, the law determines whether the provocation is great or slight. And the jury have the right to be told what amounts, in law, to great, and what to slight, provocation. If a man unlawfully shoot at another in a place where he has the right to be, he may repel force with force, and if he kill his assailant he cannot be convicted of murder in the first degree. Every man has the right of self-defense of himself and family, and, when attacked in his home, he is not bound to flee therefrom before exercising this right, but, smarting under strong provocation, he may exceed the bounds set by the law, and knowingly use greater force than necessary; and yet he would not be guilty of murder in the first degree, but of a lesser offense. When the provocation is great, the court should not submit to the jury the question as to whether, if any, it be slight; for thereby the jury may be easily misled into giving a verdict contrary to law. The second instruction is equally objectionable. Not that it does not state the law correctly, but because it stops short of the law. It places on the prisoner the burden of proving self-defense, and requires him to do so by a preponderance of evidence. From the reading of this

instruction the jury would be led to infer that the evidence produced by the prisoner on this issue must preponderate over that produced by the State. Such, however, is not the law. The prisoner's defense may be fully made out by the evidence for the State. The instruction follows point 1 of the *syllabus* in the case of *State v. Jones*, 20 W. Va. 764. This *syllabus* was written to meet the claim that when self-defense was relied on the State was bound to disprove it beyond all reasonable doubt; and the court held that such was not the law, but the burden of establishing the affirmative was on the defendant, which, however, he might show by the State's evidence as well as his own. If, on the State's evidence alone, self-defense is established by a preponderance of the evidence, the prisoner is entitled to an acquittal, although he introduce no evidence on his part. This clearly appears from the second point in the *syllabus* referred to in the case of *State v. Jones*. To make a good instruction, the substance of these two points must be combined. The instruction, as given, is doubtful in meaning and misleading.

The prisoner asked 11 instructions. The court gave 5, and refused 6. Half could not be given, because unequal in number, so the State had the benefit of the unequal division. Those denied are as follows:

"No 6. The court instructs the jury that, before you can find the defendant guilty of murder in the first degree, you must believe from the evidence that the killing of Dr. Harris was willful, deliberate, and premeditated, and with malice aforethought, and was the result of cool, deliberate judgment, and previous malignity of heart, without justification, excuse, palliation, or alleviation.

No. 7. The court instructs the jury that where a homicide has been committed, and it appears from the evidence that there was an old grudge existing between the parties, but that at the time of the homicide there was a fresh and sudden provocation given by the deceased to the defendant, then the law presumes that such killing was caused by such fresh provocation, and not due to the old grudge.

No. 8. The court instructs the jury that if you believe from the evidence that the house in which defendant lived was assaulted by the deceased, and that the deceased shot at and into the said house, where the defendant and his family was at sup-

per, and if you further believe from the evidence that the prisoner at the time had reasonable cause to believe that he, or any member of his family, were in danger of losing their lives or suffering great bodily harm at the hands of the deceased, then the defendant had a right to defend his house, even to the extent of taking the life of the deceased; and if you further believe from the evidence that the defendant killed the deceased, believing from the surrounding circumstances and the conduct of the deceased and the fierceness of the assault of the deceased that it was necessary so to do to protect his house and his family, then you should find the defendant not guilty.

No. 9. The court instructs the jury that the dwelling house where a man lives is his home or castle, and that he may repel force by force in the defense of his person, habitation, or property against one who manifestly intends and endeavors by violence to commit a known felony on either, and in such case he is not bound to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill his adversary in so doing, it is justifiable self-defense.

No. 10. The court instructs the jury that a person has a right to repel force by force in the defense of his person, his family, or his habitation, and if, in so doing, he use only so much force as the necessity or apparent necessity of the case requires, he is not guilty of any offense, though he kill his assailant in so doing.

No. 11. The court instructs the jury that although, upon a trial for murder, where the defendant relies upon self-defense in justification of the killing, the burden is upon the defendant, yet this in no wise relieves the State from proving all the elements of murder, if it seeks a conviction, beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis; and if, in the case on trial, the burden is upon the prisoner to prove that he was acting in self-defense, by a preponderance of the evidence, yet this in no wise relieves the State, if it seeks a conviction, from proving the prisoner guilty beyond every reasonable doubt, and to the exclusion of every other hypothesis, and that if the State does not so prove the defendant guilty beyond every reasonable doubt, and to the exclusion of every other hypothesis, they must find the defendant not guilty."

Careful examination of these instructions reveals no good rea-

son why they all should not have been given, unless the court adopted the theory that there was no evidence to establish the prisoner's justification of self-defense, for the reason that the prisoner had acted, if on any, but slight, provocation, and that therefore there was no evidence to sustain the instructions. The deceased was drunk,—crazy drunk,—and had been wildly shooting more than 30 times; had turned his revolver and shot into the prisoner's house, and in the direction of the prisoner and his family. Now, must the prisoner patiently wait until one of his family is hit or killed, or shall he defend them? What should an ordinary man do under such circumstances? Of course, a good Christian would have gone into the cellar with his family, if there was one, or would have taken to the woods until sleep, gentle sleep, overcame the belligerent doctor, and then quietly slipped into his home and bed, if he could have found out when the doctor was overcome by his potations. A law-abiding citizen would have concealed his family, and sought the aid of an officer of the peace, if he could be found. They seemed to be scarce, from the lawless way the doctor had been carrying on all day. But an average man, with an average temperament, would have given blow for blow, shot for shot, eye for eye, tooth for tooth, life for life. Whether the prisoner went further than the law justifies him in doing, he has the right to have an impartial jury of his peers, properly instructed as to the law, to say. And he has the right to have his defense presented by proper instructions. While, in some respects, some of the six instructions refused are met by the five instructions given, yet no single instruction is fully covered by those given, but they are essentially different in language, so as to present the matter thereof in different phases to the jury. *State v. Kerns*, 47 W. Va. 266, 34 S. E. 734; *State v. Cain*, 20 W. Va. 679; *Honesty's Case*, 81 Va. 283; *Parrish v. Com.*, Id. 1; *Stone-man's Case*, 25 Grat. 900; *Carroll v. State*, 23 Ala. 28; *Pond v. People*, 8 Mich. 150; *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452.

The last error assigned is that the verdict is contrary to the law and evidence. As there will have to be a new trial, it becomes unnecessary for the court to pass on the evidence as a whole, or any further than has heretofore been done, to show the relevancy of the instructions refused. So it may be said with regard to the various other assignments of error. The

lower court will have opportunity to correct them all on a new trial.

For the foregoing reasons the judgment is reversed, the verdict of the jury set aside, and a new trial awarded, and the case is remanded to be further proceeded in according to the foregoing opinion and the rules and principles of law.

IN RE REESE.

47 C. C. A. 87—107 Fed. Rep. 942.

Decided March 28, 1901.

CONTEMPT—LABOR UNION CASE: *Only parties to an injunction can violate it—Contempt, punitive and remedial—proceedings differentiated—Section 725 U. S. R. S. 1878 construed—Habeas corpus the proper remedy, when one not a party to an injunction suit, is proceeded against by petition filed in the original suit, and thereon committed for contempt in violating the injunction.*

1. Where a person willfully commits an act of flagrant disrespect toward a court, the offense is against the majesty of the law. Such contempt is termed criminal contempt, and the offender should be prosecuted by a direct proceeding against him.
2. Where a person disobeys an order or injunction of a court entered against or served on him in an action in which he is a party at the instance of another party to the suit, the proceeding against him for such disobedience is *remedial* in its nature, and is not instituted for punishing him for an indignity or insult directed at the court or its process.
3. The relator, Reese, was not a party, or an agent to a party to a certain suit for injunction; yet by a petition filed in the injunction suit he was brought in, charged with violating the injunction issued therein, and was thereon committed as for contempt of court. *Held*—that even though he might have been independently prosecuted for contempt of court for doing an act in flagrant disrespect of the court, as an unwarranted interference with the administration of justice, yet, not being a party to the suit, he could not be punished for disobedience of the injunction not directed to him.
4. The writ of *habeas corpus* is not the proper remedy to correct errors committed by a court acting within its jurisdiction, yet, it is the proper remedy, where a person, not a party to an injunction suit, is, by a petition filed in such suit, brought in and committed for a supposed violation of the injunction issued therein.
5. Section 725 of U. S. R. S. of 1878, in relation to the powers of courts in contempt cases, construed.

United States Court of Appeals; Eighth Circuit.

Appeal from the Circuit Court of the United States for the District of Kansas.

John P. Reese, having been convicted in the District Court in the Third Division of the District of Kansas of contempt of court, in a supposed violation of an injunction, made application to the Circuit Court of the United States for the District of Kansas for his release upon a writ of *habeas corpus*. The Circuit Court granted the writ and ordered that the petitioner, Reese, be discharged, from which order, the jailor appealed. Affirmed.

On June 13, 1899, the Western Coal & Mining Company, a corporation of the State of Missouri, exhibited its bill of complaint to the Circuit Court of the United States for the District of Kansas (Third Division) against W. T. Wright and 45 other persons by name, charging that they, and each and all of them, were residents and citizens of the State of Kansas; and also against "all members of the United Mine Workers lodges or unions in Crawford and Cherokee Counties in the State of Kansas;" and against "all members of District No. 14 of the United Mine Workers of America, citizens of the State of Kansas, co-operating with them, whose names are not known to your orator; and your orator prays that it may be permitted to add hereto the names of such other persons, citizens of Kansas, as may become known and charge them in apt words as in the premises." The bill charges that the defendants so named and described by force, threats, intimidation, and violence are preventing and threatening to prevent the plaintiff's employes from prosecuting their customary and usual work at complainant's mines, and are by the same means preventing and threatening to prevent others who desire to work for complainant from so doing, to such an extent that complainant, without the restraining aid of the court, would be unable to prosecute its usual and ordinary business of mining coal, and would suffer irreparable injury and damage, not only from the enforced stoppage of its business, but in the serious and permanent injury to its machinery and equipment which would be occasioned by the enforced stoppage of their operation. The prayer of the bill was for a provisional and permanent injunction against "said de-

defendants and each and all other persons co-operating with them whose names are not known to your orator, and all other members of the lodges or unions of the United Mine Workers of America in Crawford and Cherokee Counties, State of Kansas, and all other persons conspiring or combining with them." But the process of subpoena was prayed for only against the defendants whose individual names were set forth in the complaint. On July 18, 1899, a temporary injunction was granted conformably to the prayer of the bill. The order granting the same commences with a statement of the parties to the suit as follows: "Western Coal and Mining Company, Complainant, vs. W. T. Wright, Robert Gilmore, Hugh Bone *et al.*, and All Members of the United Mine Workers Lodges or Unions in Crawford and Cherokee Counties in the State of Kansas, and All Members of District No. 14 of the United Mine Workers of America, and All Other Persons Co-operating with Them Being Citizens of Kansas, Defendants," and, after stating the submission of a motion for a temporary injunction, proceeds as follows: "It is therefore now here ordered that the defendants above named, and each of them, and all other persons who have or may combine, confederate, or conspire with said defendants, or either of them, are hereby severally and collectively temporarily enjoined and restrained from in any manner interfering with," etc. This injunctive order was never served on Reese. Afterwards, on October 18, 1899, the complainant filed in the case so instituted by it against Wright and others, hereafter called the "main case," what it calls a "motion to commit for violating injunction," and, among other things, sets forth that John P. Reese was a citizen of the State of Iowa; that he came to Crawford County, Kansas, at the head of a column of about 300 men, commonly in the main case called "strikers," and interfered with the miners of the complainant, and trespassed upon its property, in violation of the commands of the injunctive order. Many charges of misconduct by Reese are found in the motion to commit, but there is no charge that he combined, confederated, or conspired with the defendants named in the original bill, or that he aided or abetted the defendants so named, or that he was the agent or servant of the defendants, or any of them. The whole scope of the motion is that Reese acted independently, combining with certain persons generally

referred to as "strikers," to interfere with the operation of complainant's mine in such a manner as would, if he had been a defendant in the case, constitute a violation of the injunctive order. The prayer of the motion is for a rule against Reese to show cause why he should not be attached for contempt for violation of the temporary injunction. Upon the filing of this motion, the court made an order in the main case as follows: "Upon motion of said complainant, it is ordered that a rule be issued on John P. Reese to appear before this court on the 17th day of November, 1899, at 10 o'clock a. m., at its court room in the city of Ft. Scott, County of Bourbon, Kansas, to show cause why he should not be committed for contempt for violation of the temporary injunction heretofore ordered and issued in the above cause." Afterwards such proceedings were had that on November 27, 1899, the court made the following order: "This cause came on for a hearing, and on the motion of said complainant to commit John P. Reese for violating the temporary injunction heretofore, to wit, on the 18th day of July, 1899, granted in said cause, and upon the rule issued by said court in said action against said John P. Reese, and duly served on him, citing him to appear and show cause, if any, why he should not be attached for contempt in failing to obey the said order of injunction. Said John P. Reese appearing in person and by his attorney, O. T. Boaz. Said complainant appeared by J. H. Rogers, W. C. Perry, and C. E. Benton, its attorneys. And the court, having heard all the evidence introduced in behalf of and against said John P. Reese on said hearing, and being fully advised in the premises, finds that the charges made against said John P. Reese in said motion are true, and finds that said John P. Reese has violated said temporary injunction granted by this court as aforesaid, and finds that said John P. Reese is guilty of contempt of court. It is therefore considered, ordered, and adjudged by the court that said John P. Reese be imprisoned in the jail of Bourbon County, in the State of Kansas, for the term of three months from this day," etc. This proceeding by *habeas corpus* was instituted by Reese after he had been committed to jail under the foregoing order of court, to secure his release on the ground that he had been deprived of his liberty without warrant of law, and by a court acting without jurisdiction for that purpose. The writ issued. The

return of the jailer who had custody of the prisoner set up the foregoing facts and order of commitment as his jurisdiction. A hearing was had before Thayer, circuit judge, in the court below, and the prisoner was discharged. In *re Reese* (C. C.) 98 Fed. 984. From the order so discharging him the jailor duly prosecuted his appeal to this court, and assigned several different errors. The second, third, fifth, sixth, seventh, and eleventh assign, in different language, practically but one error, and that is that the court erred in holding that Reese was not a party to the suit in which the order of commitment was made, and that the injunctive order did not extend to him. The fourth is, in substance, that the court erred in holding that Reese was not amenable to the proceedings for contempt as an aider or abettor of persons who were defendants in the main case. The other assignments, so far as they were urged at the hearing, were general in their character to the effect that the court erred in discharging the prisoner. It was also argued that the court below had no jurisdiction by the writ of *habeas corpus* to question the legality of the proceedings resulting in the order of commitment, but that such proceeding could only be reviewed by appeal from the order.

J. H. Richards and *W. C. Perry* (*Morris Cliggitt, T. N. Sedgwick, and C. E. Benton*, on the brief) for appellant.

W. H. Rossington, for petitioner.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, delivered the opinion of the court.

We are relieved from a consideration of the assignments of error to the effect that the trial court erred in holding that Reese was not a party to the main case, and that the injunctive order made in that case did not extend to him. Neither the oral arguments nor briefs of counsel urge upon us any such consideration, and it appears as an agreed fact in the record that it was admitted at the trial below "that the order of injunction ran against citizens of the State of Kansas only, and that Reese, being a citizen of Iowa, was not within the terms of the order, and that he could not violate it." But it is earnestly contended by counsel for appellant that, although Reese was

not a party to the main case, and as such bound by the obligation of the court's restraining order, he was, nevertheless, properly punished for contempt of court in knowingly aiding, abetting and assisting the defendants in that case, in violating the order made against them, and for organizing and leading a body of men independent of the defendants, or either of them, to do the acts and accomplish the results which the court undertook to prevent by issuing the orders against the defendants in the case. In order that there may be no misunderstanding of the situation, it should be borne in mind that Reese was not charged in the motion for commitment with aiding, abetting, or assisting, or combining, confederating, or conspiring with the defendants, or either of them; neither was he charged with doing the acts complained of as their servant or agent. The substance of the charge as made against Reese was that he did the acts complained of without any relation to or connection with the defendants, as an independent exercise of his own will. The theory of the complainant at the time of making the motion for commitment unquestionably was that Reese was a party to the suit. It accordingly charged him with doing what he did in violation of the injunctive order, and all the subsequent proceedings were in harmony with that theory. Now, it being conceded that he was not such a party, it is attempted to sustain the sentence of commitment on the broad ground that the petitioner, if not technically guilty of violating the injunctive order, was guilty of contemptuously obstructing the administration of justice by doing the things which other parties had been enjoined from doing, with knowledge of such injunctive order against them. In support of this contention we are directed to section 725, Rev. St. U. S. 1878, which is as follows:

"The said court shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transaction, and the disobedience or resistance of any such officer, or by any part, juror, witness,

or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

This section undoubtedly confers ample power upon the court to punish any person for intentional resistance to any of its orders. The word "disobedience" aptly applies to a party or other person against whom an order is made. The word "resistance" manifestly is applicable to a party to the suit, and may be applicable to "other persons" referred to in the section. It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purpose of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order. Such contempt, however, are totally different offenses from those which the parties to the case commit when they disobey a direct order made in a case for the benefit of the complainant. The one is an offense against the majesty and dignity of the law. The other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court. The power to punish for contempt is not limited to cases of disobedience by parties to the suit of some express command or rule against them, but, subject to the limitations imposed by section 725, *supra*, is co-extensive with the necessity for maintaining the authority and dignity of the court. *Ex parte Robinson*, 19 Wall. 505, 22 L. Ed. 205; *Ex Parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Eilenbecker v. District Ct.*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *In re Debs*, 158 U. S. 564-596, 15 Sup. Ct. 900, 39 L. Ed. 1092; *In re Rosser*, 41 C. C. A. 497, 101 Fed. 562.

In the case of *Seaward v. Paterson*, 76 Law T. (N. S.) 215, decided by the Court of Appeal of England in 1897, an injunction was issued against Paterson to restrain him from holding glove fights or boxing contests on certain premises. One Murray, who had later acquired possession of the premises and conducted

boxing contests thereon, was cited for contempt. It was answered that Murray was neither a party to the action nor an agent or servant of such party. The trial court (Lord North) adjudged Murray guilty on the distinct ground of knowingly aiding and assisting in doing that which the court had prohibited, and in so doing distinguished between that kind of contempt and that consisting of a disobedience to an order by a party to the suit in which the order was made. From the judgment of Lord North an appeal was taken to the Court of Appeal, and after full argument was decided by the three lords, Lindley, Smith, and Rigby. Lindley delivered the main opinion. He approved the action of the trial court, and said, among other things:

"Murray was not a party, either first or last. Now, let us pause and consider upon what jurisdiction the court can proceed against Murray. There is no injunction against him. He is no more bound by that injunction than any other member of the public. He is, however, bound, like other members of the public, not to interfere with and not to obstruct the course of justice, and the case made against him must be this, if anything: not that he has technically infringed the injunction, which has not been granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction which has a technical meaning. . . . The notice of motion to commit for breach of an injunction, which is technically wrong unless he is bound by the injunction, and a notice of motion to commit a man for contempt of court not because he is bound by the injunction by being a party to the case or anything of that kind, but because he is conducting himself so as to obstruct the course of justice, are totally different things. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against. The proceedings against him are for the purpose of enforcing the order of the court for the benefit of the person who got the order. In the other case the court will not allow its process to be set at naught, and treated with contempt. The consequence is this: that in the one case the party who is interested in enforcing the order is enforcing it for his

own benefit, while in the other case, if the order of the court has been contumaciously set at naught, he cannot settle it with the person so acting, and save that person the consequences of his act. The difference between the two kinds of contempt is well known, although in some cases there may be a little difficulty in saying on which side of the line they fall."

To the same effect is the case of *Wellesley v. Earl of Mornington*, 11 Beav. 181. This last case is cited with approval by Judge, now Mr. Justice, Brown, in *Phillips v. City of Detroit*, 19 Fed. Cas. 512 (No. 11,101); by the Supreme Court in *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; and by the United States Circuit Court in *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 508; and in 2 Daniel, Ch. Prac. (5th Ed.) p. 1685. The same doctrine is, in effect, applied in cases in which the court has property in its possession through the instrumentality of a receiver appointed by it. An unauthorized interference with the possession of the receiver by any persons, whether parties to the suit or not, is an unauthorized interference with property in the custody of the court and is regarded as a contempt of the authority of the court, not because it is in violation of any direct express command against the person offending, but because it is an unjustifiable interference with the administration of justice, and tends to obstruct the court in the execution of its powers and maintenance of its authority. Beach, Rec. (Alderson's Ed.) Nos. 250, 256; *Cartwright's Case*, 114 Mass. 230; *Ex parte Tyler*, 149 U. S. 164-181, 13 Sup. Ct. 785, 37 L. Ed. 680, and cases cited; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and cases cited.

From the foregoing it is apparent that the offense of violating an express restraining order issued at the suit of a private litigant for his protection is one thing, dependent upon the actual existence of such restraining order against the person charged with the offense in a suit to which he is a party by name or adequate representation; and that the offense of a person not a party to a suit in aiding and abetting such a party to disobey or resist a restraining order against himself, or independently and intentionally preventing the execution of such order and thereby thwarting the administration of justice, and contemning the authority of the court,

is another, and essentially, different thing. Adverting again to the facts as disclosed in the preceding statement, it appears that the petition for a rule against Reese was presented to the court by the complainant in the main case as a remedy to which it conceived itself entitled. The petition charged Reese with violating the terms of the injunctive order made in the main case. He was ordered to show cause why he should not be punished for violating that order. The finding was that he had violated it. The judgment was that he be committed for violating it. It also appears that he was not only not made a party to the case by name or representation, but that the complainant intentionally and studiously avoided making him such a party. From these incontrovertible facts there can be no question as to the jurisdiction which was invoked and which was sustained in the proceeding to punish Reese, namely, that he has violated an express order of the court made in the case against him. There is nothing in the petition, order to show cause, or commitment remotely suggesting the purpose of the court to punish him for a wilful resistance or disregard of the court's authority, or for interfering with or obstructing the course of justice otherwise than the same is involved in violating an express order of court alleged to have been made in the case against him. The petitioner had the right, therefore, accorded to him by the Constitution of the land and time-honored precedent, to stand upon the accusation as made, and to defend against the charge as made, namely, that he had violated the injunctive order. He exercised that right, and, after being found guilty and imprisoned, immediately proceeded to challenge the lawfulness of his restraint for the reasons that he was not a party to the cause in which the injunction issued, and that the court was without jurisdiction to call him to an account for violating it. "Contempt of court is a specific criminal offense. The imposition of a fine is a judgment in a criminal case." *City of New Orleans v. New York Mail S. S. Co.*, 20 Wall. 387, 22 L. Ed. 354; *In re Swan*, 150 U. S. 637-652, 14 Sup. Ct. 225, 37 L. Ed. 1207; *Church, Habeas Corpus*, No. 308. Judge McCrary says in *Vanzandt v. Mining Co.* (C. C.) 48 Fed. 770, in treating of a case of interference with a judicial proceeding by a party not enjoined therein.

"A proceeding for contempt is in the nature of a criminal proceeding, and to be governed by the strict rules of construction which prevail in criminal cases. Its purpose is not to afford a remedy to the party complaining, and who may have been enjoined by the acts complained of. That remedy must be sought in another way. Its purpose is to vindicate the authority and dignity of the court."

It follows from these well-recognized principles that the petitioner was entitled to be informed of "the nature and cause of the accusation" against him, and to be tried on the charge as made, and on no other charge.

We entirely agree with counsel for appellant that it is not competent for a court in proceedings by *habeas corpus* to review the facts upon which the commitment was ordered, or the regularity merely of the proceedings which resulted in the commitment. If any error be committed in these respects, the remedy of the prisoner is by appeal from the order of commitment. But the conclusion reached in this case involves no such questions. The petitioner, not being a party defendant in the main case, was not subject to the jurisdiction of the court in that case, and the court had no authority to punish him for the offense as charged against him in the motion for commitment, and, a *fortiori*, no authority on that motion to punish him for some other offense not therein charged against him. This conclusion supersedes all further inquiry as to the availability of the writ of *habeas corpus* as a remedy to secure the discharge of the prisoner. *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, is direct authority for this conclusion. In that case certain parties sought to enforce an obligation of the State of Virginia by proceeding against certain of the State officers, who were afterwards held in contempt for disobedience of the orders of the court made in the case. The court held that the officers sued had no interest in the subject-matter involved; that the suit was really against the State of Virginia, and therefore within the prohibition of the eleventh amendment to the Constitution, prohibiting suits by individuals against a State. The court, by Mr. Justice Matthews, says:

"When a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order it-

self, being without jurisdiction, is void, and the order punishing for contempt is equally void; and that, when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner. . . . All the proceedings in the exercise of the jurisdiction which (the court) assumed are null and void. The orders forbidding the petitioners to bring the suits for the bringing of which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt, were equally void, and their imprisonment is without authority at law."

Mr. Justice Miller, in *Ex parte Fisk*, 113 U. S. 713, 718, 5 Sup. Ct. 724, 726, 28 L. Ed. 1117, 1119, says:

"When, however, a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now in the jurisprudence of this court that when the proceedings for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner that, for the reason mentioned, the order which he is held is void, this court will, in the language of the statutes, make inquiry into the cause of the restraint of liberty."

See also, *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787; *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Ex parte Terry*, 128 U. S. 304, 9 Sup. Ct. 77, 32 L. Ed. 405.

In the light of these cases, and many others cited in them, we ascertain no doubt that the writ of *habeas corpus* was an appropriate remedy for the petitioner to secure his discharge from imprisonment. The judgment of the trial court is affirmed.

CALDWELL, Circuit Judge. I concur in the result, not alone on the grounds stated in the opinion, but on the further ground that the Circuit Court had no jurisdiction of the original case, and reserve the right to file an opinion to that effect.

NOTES (By J. F. G.).—The opinion in this case is of more than ordinary value, and should have considerable effect in correcting abuses, which within the past few years have crept into the practice pertaining to labor cases. Not only has the writ of injunction been applied to uses

hitherto unknown, but the practice, seasoned by the wisdom and sound judicial experience of centuries, has been ignored, and a new and unwarranted practice substituted. This may be attributed largely to the fact, that lawyers representing the employers of labor have taxed their knowledge, abilities, ingenuity and subtlety, sparing neither labor or expense, in presenting their cases in as favorable light as possible, while less industry and research has been displayed on part of the defenders of labor unions. Labor unions have not yet realized that the courts furnish a favorable arena for the present conflict between capital and labor, and, that they owe it to themselves, and to the country at large, to arrest this gradual encroachment on the liberties of the people, through the misuse of the writ of injunction. Waiving a comprehensive analysis of the subject, which would be too extensive for this volume, we will confine our notes to matters of practice.

The Writ of Injunction—How it issues, and how it should be served:—

To procure an injunction, the complainant presents his bill of complaint to a court of chancery, setting forth his grievances and praying for process by *subpoena* or summons commanding the defendant or defendants to appear and answer the bill; and further alleging that unless the defendants be immediately restrained from doing certain acts injurious to his interests, that he will sustain irreparable injury; and further praying that a writ of injunction may issue temporarily restraining the defendant or defendants named from doing such specified acts, until the matter is adjudicated and a final decree is entered in the case.

The function of the *subpoena* or summons is to call in the defendant, or defendants, to answer the charges, and to give the court jurisdiction to hear and to determine the matter, and to enter a final decree; while the writ of injunction is auxiliary and subsidiary to the *subpoena* or summons, its function being only to restrain the person or persons named therein until the merits of the case can be heard and adjudicated upon. The writ therefore depends upon the *subpoena* or summons for its vitality. It cannot stand alone; for to perpetually enjoin a person from doing an act, without giving him an opportunity to appear and defend, would be to determine the merits of the matter *without due process of law*. Under ordinary circumstances, a writ commanding a person, who has not yet been given any official notice of the suit, to refrain from doing an act, is not consistent with good practice. The better practice is to have the *subpoena* or summons served at the same time that the writ of injunction is served; yet it seems permissible to serve the writ of injunction first, and afterward serve the *subpoena* or summons, returnable to the first term of court having, in point of time, jurisdiction of the case; for cases may at times arise, where the least possible delay might result disastrously to the right of the complainant, and defeat the entire purpose of the action.

The writ of injunction is served by showing the *seal* on the original writ and delivering to the defendant a label or copy; for as the person enjoined must act immediately at his peril, there should be the utmost certainty as to the validity of the supposed writ.

In his work entitled: *THE MODERN PRACTICE OF THE HIGH COURT OF CHANCERY*, issued in 1785, on page 595, Mr. Hinde says:—

"Injunction is served by shewing original under seal, and delivering a true copy thereof to the party personally."

In a foot note on the same page, appears the following:—

"Service must be personal on party, unless the court upon peculiar circumstances, dispenses with personal service, as where the plaintiff at law cannot be found or resides abroad, upon affidavit court will substitute a service upon his solicitor or attorney."

On page 66 of Eden on Injunctions, edition of 1821, the learned author says:—

"The Writ of Injunction is made out by the clerk of the court upon the order being left with him; and must be personally served on the defendant, his solicitor, and attorney. It is served by showing it under seal, and delivering a copy to the party; the person serving it, is not bound to deliver the writ itself to be compared with the copy. Though the service ought to be personal, yet the court, as in the case of service of a *subpoena*, will, under circumstances, dispense with personal service; thus service of the order at the house which appeared to be the defendant's last place of abode, was ordered to be good service, though the house was apparently shut up."

On page 1674 of Daniel's Chancery Pleading & Practice, the author, who is generally accepted as authority, says:—

"Unless substituted service has been authorized, the service of the injunction or restraining order must be personal; and is effected, by leaving with the person served a true copy of the writ or order; and, at the same time, showing him the original writ as duly issued, or the restraining order as duly passed and entered."

Mr. Joyce on pages 1313 & 1314 of his work on Injunctions, says:—

"Unless substituted service has been ordered, which in a proper case will be done, the service of the order for the injunction, and the writ of injunction, must be personal, and is effected by leaving with the person served a true copy of the writ or order; and, at the same time, shewing him the original writ as duly issued, or the order for the injunction as duly passed and entered. If the plaintiff cannot succeed in serving an injunction on the defendant, and the defendant's solicitor refuses to except service, service will be ordered on the solicitor."

On page 631 of Barbour's Chancery Practice, that well known author says:—

"An injunction must be personally served upon the defendant, and upon his solicitors, his attorneys, or agents, by delivering to and leaving with each of them a correct copy of the writ, and at the same time showing him the original writ under the seal of the court; unless the court, under particular circumstances, dispenses with the personal service, and orders a substituted service to be made in some other manner. Service of the writ at the house which appeared to be the defendant's last place of abode has been ordered to be good service, though the house was apparently shut up."

In the case of *Whipple v. Hutchinson* 4 Blatchford, 190 Mr. Justice Nelson, then one of the Justices of the Supreme Court of the United States, held,—that contempt proceedings could not be maintained for violating an injunction against a party who had been served by simply delivering to him a copy of the writ. The court held, that in a proceeding so penal in its nature, there must be a strict compliance with the practice.

As to the necessity of showing the seal at the time of serving the writ, see, also:—Jennison's Equity Practice 308 and *Watson v. Fuller*, 9 How. Pr. 425; *Coddington v. Webb*, 4 Sandf. 639.

We do not contend that this strict practice applies to cases, where the defendant has reasonable notice that an injunction will be applied for and fails to appear at the appointed time, nor to cases, where the defendant being in open court, and knowing that the matter of granting an injunction is then before the court, voluntarily withdraws from the court room before the order is announced and entered; but we do claim, that it does to all cases of temporary injunctions issued without notice, in those jurisdictions where the practice is not specially regulated by statute.

Of late years it has been contended, and with some degree of success, that ordinary notice that an injunction has issued, is as effectual and binding as an actual service of the writ, and with a hasty glance, this practice would seem to be sustained by several very respectable courts; but evidently is based on a misconception of several authorities.

The leading authority which has often been cited on this phase of the subject, and has been made especially prominent through recognition by a writer of high standing, is *Mead v. Norris*, 21 Wis. 315, decided in 1867; but those relying on it, do not notice the fact, that by chapter 129 of the Wisconsin Revised Statutes of 1858 the writ of injunction was expressly abolished, and a statutory action substituted.

In the case of *In re Lennon*, 166 U. S. 548, 17 Sup. ct. R. 658, 41 L. ed. 1110, *Mead v. Norris* is cited, practically as the sole authority, on the proposition, that "actual notice" dispenses with the service of the writ; but, "actual notice" is a very elastic term, and the kind of notice there referred to, does not appear;—it may have been personal knowledge. As the United States courts follow the English chancery practice, it is not to be presumed that the Supreme Court of the United States intended to abandon the established practice and follow that of a jurisdiction where the writ of injunction has been abolished and a new practice created by statute. It is more reasonable to presume, that the "actual notice," in the matter then under consideration, was more than ordinary written or verbal notice, and was such as the court would have accepted without any citation of authority, and accordingly did not question the basis of *Mead v. Norris*.

Another case relied upon in support of this innovation into the practice is *Ex parte Richards*, 117 Fed. Rep. 658, decided by the United States Circuit Court, of the Southern District of West Virginia; but the question there before the court was, whether the court had jurisdiction,—

the complainant and the defendants being citizens of West Virginia, and there being no service of the original process (*subpoena*) prior to the alleged violations of the writ of injunction. It does not appear that any question arose as to the service of the writ.

Fleming v. Patterson, 99 N. C. 404, has been cited; but in that case also, the objection was,—that no *summons* had been served upon the defendant. Upon this proposition the court said:—"Regularly, every civil action must be begun by a summons, and such action is begun when a summons is issued as original process. (citing the Code, and cases.) A party may, however, waive the original process, by appearing in the action and making defence, as if he had been served with such process." Later in the opinion the court said:—"It is not the *service* of the original process that gives force and effect to the injunction—these spring out of, and are founded in the authority of the Judge to grant it, and the party against whom it is directed is bound to observe its commands—he disregards it at his peril. The injunction is itself process, and notice of it to the defendant is sufficient to give it efficacy." Whether the court was speaking of a *statutory* notice or not, does not appear in the opinion; but for the purpose of this brief review it is sufficient to suggest, that the Civil Code of North Carolina,—chapter XXXVII sec. 806, provides,—*"The writ of injunction as a provisional remedy is abolished, and an injunction by order is substituted."*

Osborn v. Glasscock, 39 W. Va. 749, has also been cited. The question of contempt for violating an injunction was not involved in that case; but the effect of an injunction upon a sale, made after notice, but before service of the injunctive order. The court said:—"That such actual notice of the restraining order is of binding force, though not served, is well settled, though not for proceeding against him for contempt. See 2 Daniell, Ch'y Pr. (6th Am. Ed.) 1684, note a. It is sufficient for the court to know that the person enjoined had actual notice of the order. 2 High, Inj. §§ 1422, 1444; *Mead v. Norris*, 21 Wis. 310." (315)

Hull v. Thomas, 3 Ewd. Ch. R. 250, has also been cited. In the report of this case it appears:—"On notice of motion for an injunction and receiver, the court granted it as against the defendants Thomas and Head." It seems that Mr. Head was not present when the matter was *argued* and passed upon, but that one who was, informed him of the result, and that he expressed his surprise. In the opinion the Vice Chancellor, quotes from *Osborne v. Tenant*, 14 Vesey 136, the language of the Lord Chancellor, as follows:—"If these parties, by their attendance in court were apprised that there was an order, that is sufficient; and I cannot attend to distinction so thin, as that persons standing here until the moment the Lord Chancellor is about to pronounce the order, which, from all that passed, they must know will be pronounced, can, by getting out of the hall at that instant, avoid all the consequence."

In a foot note to *Hull v. Thomas*, appears the following:—"For the writ of injunction, as a provisional remedy, the Code (218) substitutes an injunction by order."

Also, there has been cited an *anonymous case* appearing on page 567

of 3 Atkins. That case was decided in 1747. The defendant contended that he was not properly served with a *subpoena* and that the writ of injunction was not sealed. The officer who served the *subpoena* made affidavit that he served the defendant by leaving a label and shewing to him the original. The following we quote as it there appears.

"LORD CHANCELLOR,

"This is not regular service, because where there is only one defendant, you ought to leave the body of the *subpoena*; but where there are several, you leave the labels with the first defendants you serve, shewing them the body only, and with the last you leave the body itself; but as the defendant has appeared, this in the common case would have cured the irregularity of the service, and the defendant could not have taken advantage of it now, (the same rule at law), but as this was just before the long vacation, when the defendant chose rather to appear than be liable to an attachment, therefore he is at liberty still to insist upon not being served at all, or irregularly served; but as to the injunction's not being sealed, that is no excuse for his proceeding at law after the injunction was granted, because there have been instances here where a defendant, or his attorney only, have been present upon an order for an injunction, and they have proceeded at law before it has been sealed, that the court have considered this as a contempt, and committed the persons for it.

"Lord Hardwicke at first directed an inquiry before the Master; but as it is to be confined merely to the contempt, and the costs upon it, to save the expense of an inquiry, he recommend it to the plaintiff, if the defendant would agree to discharge him out of execution, to waive the motion; and the parties, on his Lordship's recommendation, did agree accordingly."

Hawks v. Fellows, 108 Iowa 133; 78 N. W. Rep. 812 has also been cited; but in the course of the opinion we find the following:—"The defendants enjoined were in court, by attorneys, when the decree was rendered, and are chargeable with knowledge of all it contained." It will be observed that the matter under consideration was a decree, and not a temporary injunction. It was a perpetual injunction against the selling of intoxicating liquors.

Powell v. Follet, 1 Dickens 116, decided October 20, 1747, was also been cited as an authority. The following is the report in full:—

"Lord Hardwicke C. held that if a party, or his attorney having knowledge of an injunction's being granted, he proceed at law, he is guilty of a contempt, though the injunction be not sealed."

Another citation is *Woodward v. King*, 2 Dickens, 797, decided in 1673. The following being the report of the case:—

"A copy of the injunction was served, and the original shewn; the party serving the injunction was held not to be bound to leave the original injunction to be compared with the copy; and his Lordship likewise held, that although the injunction might issue irregularly, yet, till so found, it ought to be observed."

It will be observed, that the latter part of the report refers to the

issuance, and not to the service of the writ.

The Practice in Illinois. Under the old English practice, the *subpoena* as well as the injunction was served by showing the seal on the original writ and delivering a label or copy. In Illinois this has been modified by statute (R. S. c. 22 s. 11.), in that a summons may be served by delivering a copy; but in the chapter relating to injunctions (c. 70.) no reference is made to the manner of serving the writ, leaving the English rule in force, section one of the chapter in relation to chancery cases providing that where no provision is made, the procedure shall be "according to the general usage and practice of courts of equity." The reason is obvious: When a defendant is served with a summons he has at least ten days in which to appear and answer to the suit; but when served with a valid writ of injunction he must obey immediately; hence, the necessity that the writ with the seal on it must be shown to him, as proof of the authority; otherwise fictitious documents could be circulated, frauds perpetrated and great injury done. At least in the County of Cook, this distinction is usually ignored, and the usual return to a writ of injunction is, that it was served by delivering a copy, and in some instances judges in that county have been disposed to accept a notice of any form as a valid service. This careless practice arises from the popular prejudice against what are termed, "technicalities;" but, courts should not confound the word "technical" with trifling matters of form not affecting the substantial rights of the parties. To be *technical* is to be *accurate*, and, *accuracy* should be the pride of good lawyers and wise judges; for inaccuracy leads to uncertainty and confusion. While simplicity in procedure is preferable to cumbrous and meaningless forms, accuracy and certainty as to substantial rights, are indispensable safeguards to the course of justice.

Necessity to serve a subpoena or sumomns on the defendant:—Injunctions are only against parties defendant.—

"It is irregular to serve a defendant with an injunction without first taking out and serving him with a *subpoena* to appear and answer." Jennison's Equity Practice 310. See also 1 Barbour Chancery Practice 632; *Seebor v. Hees* 5 Paige 85 *Fellows v. Fellows*, 4 Johnson Chancery Reports 25; Lord Eldon's opinion in *Attorney General v. Nichols*, 16 Vesey 338.

On page 322 of Eden on Injunctions, the author says:—

"By 4 Anne, c. 16. s. 22, a *subpoena* may issue upon a bill for injunction to stay waste before the bill is actually filed, though it must be served before the return. This, however is rarely done and indeed till lately, a practice has become very general, not to serve any *subpoena* at all. This irregularity has, however, been reformed, by a determination of Lord Eldon; and at present, if an injunction were to be obtained without service of the *subpoena*, it would be dissolved. In the case alluded to, this was not done, as the party had been misled by the practice which had before obtained; but Lord Eldon permitted the defendant to show cause upon affidavits, considering the right to an answer to have been waived by the omission to serve a *subpoena*." (From a foot note it appears

that the case referred to is, *Attorney General v. Nichols*, 16 Vesey 338.)

In *Corey v. Voorees* 2 N. J. Chancery, 5, the court said:—"Nothing could work greater injustice, than to allow a party to obtain an injunction, and then let his cause sleep. It was accordingly held by Chancellor Williamson, at April Term 1829,—that a party must take out a *subpoena* on taking out an injunction, and that he would dissolve an injunction if that practice was not adopted."

In *Iverson v. Harris*, 7 Vesey, 257, Lord Eldon said:

"I find that the court has adhered very closely to the principle that you cannot have an injunction, *except against a party to the suit*."

In *Fellows v. Fellows*, 4 Johnson Chancery Reports 25, the court said:—

"The court has no right to grant an injunction against a person whom they have not brought, or attempted to bring, before the court, *by subpoena*. I have no conception that it is competent in this court to hold a man bound by an injunction, who is not a party to the cause, for the purpose of the cause. I shall, accordingly, dissolve the injunction as against those persons who were not made parties to the suit."

In *Watson v. Fuller*, 9 Howard Practice Reports 425, upon an *ex parte* motion for an attachment the court said:—

"The motion must be denied. The parties sought to be held for contempt are not parties to the action. This, in my judgment, is fatal." (Citing Maddock's Chancery Practice)

See also, *Boyd v. State* 19 Neb. 128.

Direct and Constructive Criminal Contempts—Civil or Remedial Contempt—Procedure:—

In the case of *In re Reese*, in drawing the distinction between an offense against the majesty and dignity of the law, and a simple act of disobedience in violation of the rights of a party litigant, the court has stated a familiar doctrine, well founded, but often ignored.

Criminal contempt,—which the court defines as "an offense against the majesty and dignity of the law," may be either *Direct Contempt* or *Constructive Contempt*.

Direct Criminal Contempt, is an offense committed entirely in the presence of the court. In such cases, the court having full knowledge of the facts has the power to immediately sentence the offender, without the formality of an extended hearing. This is an inherent self-sustaining power, necessary to the orderly and expeditious administration of justice.

Constructive Criminal Contempt, is an offense committed either partly or entirely out of the presence of the court, in which case, the court not having a full, if any, personal knowledge of the facts, cannot proceed, except by an accusation in writing under oath, specifically charging the facts constituting the offense. By the filing of this affidavit and the issuance of an attachment, or rule to show cause, a *criminal action* is commenced. If the defendant remains silent, or if he admits the accusation to be true, the court may pass sentence on him; but, if by a written answer under oath, he denies the statements of the accusation, or sufficient of them to put at issue any essential and necessary part

of the accusation he is deemed purged of the alleged contempt; for there being no jury trial recognized in proceedings of this class, and the issue being of a criminal nature, it cannot be tried; but if the defendant swears falsely in his answer he may be prosecuted for perjury. (The practice as well as citations of authorities on this branch of the subject is given in 11 American Criminal Report 318; also see *Oster v. People*, in this volume.)

Remedial or Civil Contempt Proceedings, as is said in the opinion in, *In re Reese*, are not instituted to inflict a punishment upon a person for any indignity offered to the court in the disobedience of its order or decree, but simply as a means of enforcing the order of the court; so it is soundly claimed, that the action is not punitive, but simply civil and remedial, and limited to the enforcement of the orders or decree in a particular case. A proceeding of this class is not an independent one, but is an auxiliary branch of the original case, and is instituted by filing a petition in the original case.

A very interesting and instructive case is that of *People v. Diedrich*, 141 Ill. 665; 30 N. E. Rep. 1038, reviewed in 11 American Criminal Report page 319. In that case it was held, that the proceeding being civil in its nature, evidence could be heard on both sides; and that the complainant had the right to appeal; but, that no fine should be imposed for the violation of the order of the court where the act of the defendant did not work an *actual injury to the rights of the complainant*. This doctrine seems to be well supported by authorities, and the case may be accepted as a leading one.

Injunctions by Proclamation. The power to issue a proclamation to the public at large rests with an executive or administrative officer, and not with a judicial officer; yet many of the injunctions issued within the past few years have savoured more of the nature of proclamations than of writs issued in pending cases. It has, of late, been but the usual practice to file a bill against certain individuals, praying for an injunction, and when the writ is issued, to have printed copies of it posted on wagons, telegraph poles, outhouses and other conspicuous places, placing the process of a COURT OF CHANCERY on a level with show bills, prize-fight announcements, and patent medicine or soap advertisements, impliedly calling on the public to obey an order directed to certain private individuals, entered in a case in which only the persons named in the bill can appear and defend, and, this has been claimed to be *due process of law*!

In 1894 the writs issued against certain members of the American Railway Union, were read aloud to crowds of people in the streets of Chicago, and subsequently many people were arraigned in court on charges of violating an injunction not directed against them. These people, not being parties to the bill, had no standing in court as defendants; they were not entitled to be heard on motions to dissolve the injunction, nor on demurrer or answer to the bill; but *without due process of law* were called on to show cause why they should not be punished for an alleged violation of an injunction, neither directed to, nor served

upon them. In these prosecutions defendants, as well as those not defendants, were prosecuted together by petitions filed in the original case; the mode of procedure being against all alike, the court ignoring the fact, that persons who were not parties to the bill, could only be held for obstructing its process or for other wilful acts aimed at the majesty and dignity of the court; and that on charges of that class, they were entitled to purge the contempt by answering under oath. This point was raised in the main contempt case, but was overruled, the court saying that it could see no difference between the rights of parties defendant to the bill, and those who were not defendants to the bill. (*U. S. v. Debs*, 64 Fed. Rep. 724.) It was proceedings of that period that prompted the late Honorable Murray F. Tuley, at the time one of the most distinguished jurists of Illinois, to coin the *fitting and lasting* term of, "GOVERNMENT BY INJUNCTION."

The two cases of Lord Wellesley v. Earl of Mornington—Their application to the present practice.

It will be noticed that in the opinion in the case of *In re Reese*, the case of *Wellesley v. Earl of Mornington*, 11 Beavan 181, is relied on as a leading case. There are two cases by that name in the same volume, one on page 180, and, the other on page 181. The two cases should be considered together. In the first of these cases, one, Richard Batley, who was not a party to the writ, was accused with a breach (violation) of it; but the Master of the Rolls held, that Batley not being enjoined, could not be guilty of a breach of the injunction. In the other case Batley was simply charged with contempt in aiding and assisting in a violation of the injunction and the Master of the Rolls held, that he was guilty of "contempt in intermeddling."

In considering these cases together, do we not arrive at the conclusion, that a person not a party to the bill, cannot be held for a disobedience of a command not directed to him and therefore is not a subject of civil contempt, and can only be proceeded against through direct proceedings for criminal contempt, in which the rules pertaining to criminal contempt procedure alone govern? It is true that the same name appears to the two cases, but that is not conclusive that the second proceeding was not a criminal contempt case in the full meaning of the term.

That the cases may be better understood in their relation to each other, as well as to their bearing on our practice, we here give them in full as follows:

LORD WELLESLEY V. THE EARL OF MORNINGTON.

11 Beavan 180.

By the terms of an injunction A. B. was restrained, but it did not extend to "his servants and agents." A motion to commit his agent C. D. for breach of the injunction held irregular; but, semble, that he might be proceeded against for a "contempt," if he knowingly aided and assisted A. B. in breach of the injunction.

Vol. 14—18.

May 5, 1848.

An injunction had been granted restraining the Earl of *Mornington* from cutting timber, &c., but the terms of the injunction did not extend to his "servants and agents."

Mr. *Roupell* and Mr. *Heathfield* now moved to commit *Richard Batley*, an agent of the earl, for a breach of the injunction.

Mr. *Willcock*, *contra*, contended that *Batley* not being named in the writ, was not liable for the breach of an injunction granted against a different person, and which did not extend to his agents.

Mr. *Roupell*, in reply, referred to *The Imperial Gas Light Company v. Clark* (a), & *Casamajor v. Strode*. (b)

The MASTER of the Rolls.

You do not ask to commit him for the contempt, but for a breach of an injunction by which he is not enjoined. I think the objection fatal to this form of notice or motion; but I by no means think that because *Batley* is not enjoined in his character of servant or agent, he cannot be punished for knowingly aiding and assisting Lord *Mornington* in doing that which this court has expressly prohibited. I must refuse this motion, but without costs.

(a) Young 580. (b) 1 Sim. & St. 381.

LORD WELLESLEY V. THE EARL OF MORNINGTON.

11 Beavan 181.

An injunction was granted against A. restraining him (but not expressing his servants and agents) from cutting timber. B. who was A's agent, with knowledge of the injunction, cut the timber. Held, that B. might be committed for the contempt, though not for breach of the injunction.

June 1 & 2, 1848.

The plaintiff having failed in his motion to commit Mr. *Batley* for a breach of the injunction, which applied to the earl only, and not to his agents, now moved to commit him for the contempt, in being party and privy to, and in aiding and assisting the breach of the injunction, which restrained the defendant, the Earl of *Mornington*, from cutting timber, &c., *Batley* at the time knowing that these facts were forbidden.

It was proved that *Batley*, who was the agent and manager of the Earl, from the time of granting the injunction in 1846, had cut trees and underwood, and appropriated the produce to the purpose of the Earl, and that he had interfered in letting the property and taking fines. All these acts were in breach of the injunction, and some of them had been done after *Batley* had been served with a clear and distinct notice of the terms of the injunction.

Mr. *Roupell* and Mr. *Heathfield*, in support of the motion. The former motion failed in consequence of this technical objection:—that it was to commit for breach of an injunction which accidentally omitted the words "servants and agents." The present motion is in a different form,

and seeks to commit for the *contempt*, in knowingly assisting in a breach of the injunction.

The court will interfere, where a person, though not enjoined, wilfully assists in the act forbidden by the court, as in *Lewes v. Morgan* (a), where after an injunction granted against *Morgan* from receiving rents, *Lewes* the solicitor of *Morgan*, with knowledge of the order, received them, an order was made for his committal for contempt.

So, where a party assaults an officer of the court in the discharge of his duty; *Elliot v. Halmarack* (b); or displaces a receiver; *Broad v. Wickham* (c); or interferes with the execution of its process; *Ex parte Clark* (d); or obstructs or interferes with the due course of justice; *Lechmere Charlton's Case* (e); *Littler v. Thompson* (g); the court interferes and punishes for contempt.

Mr. *Turner*, for the trustees, supported the application arguing that it was necessary to make amenable third parties who were instrumental in committing acts in breach of the order and injunction of the court, or in obstructing its process; otherwise the judicial power of the court would be crippled, and its orders evaded. That the court did interfere in such cases, especially in the instance of marriages of wards, where it committed all persons concerned, whether restrained by the injunction or not.

Mr. *Walpole* and Mr. *Willcock* said, that by their advice Mr. *Batley* threw himself on the favorable consideration of the court, and regretted if he had, through error or misapprehension, done any thing that might be deemed a violation of the order of the court, which he had erroneously considered applicable to the earl only. They said, that nothing had been done since the first motion, and that Mr. *Batley* had already been punished by having to pay his own costs of the former motion, which were very considerable.

The MASTER of the ROLLS.

Does the plaintiff press for a committal?

Mr. *Roupell* stated that it was not his desire to press for the committal.

The Master of the ROLLS. By the forbearance of the plaintiff, I am spared the painful necessity of making an order. If the matter had been pressed I should have found it my duty to commit Mr. *Batley* for his contempt in intermeddling with these matters; some of his acts in contravention of the injunction are distinctly proved though with respect to others there may be some shadow of doubt.

Batley in the position in which he was and knowing the duty of the Earl of *Mornington* ought to have taken care not to do any acts in violation of the order of the court. I am glad to be relieved from the necessity of ordering a committal but *Batley* must pay the costs of the motion.

A question was raised whether it was necessary to serve the trustees with notice of this application.

The MASTER of the ROLLS said he thought that the trustees had been properly made parties to the application to commit.

(a) 5 Price, 42; (b) 1 Merivale, 302; (c) 4 Sim. 511; (d) 1 Russ & Myl. 563; (e) 2 Myl. & Cr. p. 342; (g) 2 Beau. 129.

OSTER V. PEOPLE.

192 Ill. 473—56 L. R. A. 462—61 N. E. Rep. 469.

Opinion filed October 24, 1901.

CONTEMPT—*In criminal contempt not committed in the presence of the court a denial upon oath by the respondent of the matters charged, purges of the alleged contempt—A proceeding in the name of the People against a receiver for disposing of property placed in his care charging contempt, is for criminal contempt, and not, for civil contempt.*

1. An independent contempt proceeding in behalf of the People for the purpose of punishing a receiver in a chancery suit for his alleged participation in the wrongful removal of the goods in his custody from the store house used by him, which goods had been returned to his possession, is criminal in its character.
2. In criminal contempts alleged to have been committed out of the presence of the court, if the defendant's sworn answer is sufficient to acquit him of the charge, he is entitled to be discharged.

Oster v. People, 94 Ill. App. 288, Reversed.

Appeal from the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook County. In the Circuit Court the Honorable Elbridge Haney, Judge presiding.

Harry Oster, sentenced for contempt; judgment affirmed by the Appellate Court; but reversed by the Supreme Court.

Myer S. Emrich for the appellant.

Rosenthal, Kurz & Hirschl for the appellee.

Mr. Justice Boggs delivered the opinion of the court:

In a proceeding in chancery instituted in the Circuit Court of Cook County by one Peter Klein against his co-partner, Morris Winkler, for a partnership accounting, the appellant, Harry Oster, was, on the 12th day of July, 1900, appointed receiver of the assets of the firm, and placed in possession of such assets in his capacity as receiver, with directions to continue the business of said firm as theretofore conducted, and with authority to employ assistants, purchase goods to replace those sold, etc. On the 7th day of August, 1900, certain creditors of the firm,

viz. the Reynolds & Reynolds Company, William Loghlin Bros., and H. P. Emmerson & Co., filed their petition in said chancery cause, in which they alleged that Martin Winkler (a brother of said Morris Winkler), said Peter Klein, and said Oster, receiver, had removed a portion of the goods (of which the assets of the firm were composed) from the stock so in the hands of said receiver for said firm from the place of business of the said firm and of said receiver, under circumstances that indicated an intent on the part of said parties to secrete said goods, and deprive the court of the control thereof, and deprive the creditors of the firm of the value thereof. The prayer of the petition was that said Oster, as receiver, should immediately demand and procure the return to him, as receiver, of said portion of said stock of merchandise so alleged to have been taken from said stock, etc. On the same day all of said parties except said Oster were notified to appear before the judge of said court in chancery sitting, and show cause, if any, why they should not be attached as for contempt, but no such action was taken as to said Oster. On the petition said Morris Winkler, Peter Klein, and Oster were brought into court, and required to make answer thereto.

The issues made under the petition and the answers thereto came up for hearing on the 7th day of August, 1900,—the same day on which the petition was filed. Evidence upon the part of the petitioners and the respondents to the petition was taken on the 7th and 8th days of said month of August. The transcript does not disclose any decree or order entered with relation to the action of the court on the prayer of the petition, but it appears from the proof in the record the goods which the petition alleged had been improperly removed from the custody of the receiver were restored to his possession during the night of the 7th of August. It appears, however, from the transcript of the record, that on the following day, the 8th day of August, during the course of the proceedings upon the petition, the court entered the following order in the matter of such petition:

"The court finds that the said Harry Oster, receiver in this case of *Peter Klein v. Martin Winkler*, being case Gen. No. 208,885 and Martin Winkler, Peter Klein, and Albert Winkler, should be, and hereby are, attached to show cause, if any they have, why they, and each of them, respectively, should not be

adjudged guilty of contempt of court, in this: that they,—that is to say, the said Peter Klein, Martin Winkler, and Albert Winkler,—with the full knowledge and consent and assistance of the said Harry Oster, receiver, did, after the appointment of the said Harry Oster as receiver in said cause in this court, to wit, after the 12th day of July, A. D. 1900, take and carry away from the possession of said receiver, and from the premises occupied by said receiver and the said firm of Winkler & Klein, sundry goods, wares, and merchandise, the property and part of the estate of said Martin Winkler and Peter Klein, trading as Winkler & Klein, and being in the hands of the said Harry Oster as receiver of the said Winkler & Klein, consisting of harmonicas, marbles, toys, pocketbooks, lead pencils, stationers' supplies, blank books, and other articles, of the value of eight hundred dollars (\$800), with the intention of defrauding said estate.

It is therefore ordered that the said Harry Oster, Peter Klein, Martin Winkler, and Albert Winkler be, and hereby are, ordered to show cause as above set forth, and directed to appear before this court, Friday, August 10th, at the opening of court, at ten o'clock a. m. on said date, before Judge Hanecy, to further answer to said charge, and to appear at such other times, from day to day and from time to time, as this court may direct, and that the further hearing of this cause be continued until Friday, August 10, A. D. 1900, at ten o'clock a. m., and that the said Harry Oster give bond for his appearance on the said 10th day of August, A. D. 1900, at ten o'clock a. m., before the said Judge Hanecy, in the sum of fifteen hundred dollars (\$1,500), with good and sufficient surety, to be approved by the clerk of this court, and upon failure to file said bond with said surety, approved by the clerk of this court, the said Harry Oster to stand committed to the county jail for such contempt, and the said commitment to stand until said bond is given."

Oster was represented by Mr. Silber, an attorney, in the matter relating to the management of the receivership, but other counsel, Mr. Myer S. Emrich, was given in charge of the defense of the charge of contempt against him. On the said 10th day of August said Oster, accompanied by his counsel, Mr. Emrich, appeared before the judge of said court judicially sitting, who presided when said order was entered, and filed an answer denying in detail the truth of the alleged facts set forth in the

order as constituting the charge of contempt against him, and directing that he be attached to answer as for contempt. The answer was verified by his oath. Counsel for said Oster read the answer to the court. The court thereupon announced that he would hold said Oster under bail to answer for perjury committed in the answer. The court then proceeded to comment on the testimony which had been given on the hearing on the issues made under the petition filed by said Reynolds & Reynolds Company and others, and concluded by announcing that he adjudged said Oster to be guilty of contempt of court, and sentenced him to be confined in the county jail for four months, and to pay a fine of \$300, and stand committed until the fine was paid. The sentence so orally pronounced was entered of record in an order entered in a cause styled, "People of the *State of Illinois v. Harry Oster et al.* Proceeding for Contempt." The substance of the order is that Oster is adjudged to be guilty of contempt, and ordered to be imprisoned in the common jail of Cook County for four months, and to pay a fine of \$300, and to stand committed to the county jail until said fine is paid. A writ of error was sued out of the Appellate Court for the First District to reverse this order and judgment, but the judgment of the Appellate Court was adverse to the plaintiff in error. The correctness of said judgment of affirmance is now before us for review.

The answer especially denied the general charge set forth in the order of the court directing Oster to be attached, and denied in detail other matters brought out in the hearing of the petition filed by the creditors. No interrogatories were filed to which more specific answers could have been required, as might have been done if the answer was not regarded as sufficiently definite as to the *factum* of the contempt. 4 Enc. Pl. & Prac. 796.

The answer, if true, acquits said Oster of the charge of contempt. The trial judge acted on the theory it was competent, on the hearing of the attachment for contempt, to consider the testimony which had been given before him on the hearing of the issues made under the petition of said Reynolds & Reynolds Company and others, as in denial of the answer or as original evidence in support of the charge of contempt, and adjudged such testimony warranted the judgment convicting Oster of the charge of contempt. The alleged acts of contempt occurred, if at all, out of the presence of the court. The purpose

of the proceeding for contempt was not to enforce any act for the benefit of the creditors of the said firm or advance the private rights of any such creditor, but to vindicate the authority and dignity of the court. The proceeding was punitive, and for the purpose of punishing Oster. The penalty was not as a means to the end that Oster should be compelled to do or omit to do some act, but as punishment to him for an act already charged to have been done. The proceeding was criminal in its nature, was independent and distinct from the chancery proceeding in which Oster was appointed receiver, and also from the intervening petition filed in that proceeding by said Reynolds & Reynolds Company and others to recover the goods alleged to have been surreptitiously removed from the custody of the receiver. It should have been, as it was, prosecuted in the name of the People of the State of Illinois. 2 Bish. Cr. Law, § 269; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375.

As a general rule, an attachment for contempt alleged to have been committed out of the presence of the court should be based upon an affidavit as to the truth of the facts constituting the alleged contempt. 4 Enc. Pl. & Prac. 779. But we do not think an affidavit was essential to the jurisdiction of the court to require Oster to show cause in this instance. The court, in the course of the hearing of the petition of the Reynolds & Reynolds Company against Oster, heard sworn testimony given in open court which constituted a sufficient foundation on which to found a charge as for contempt and to award the process of attachment necessary to bring Oster before the court in order the charge might be judicially heard and determined. 4 Enc. Pl. & Prac. 776, 780. The court, in the order entered August 8th directing the said Oster to appear August 10th (the day fixed for the hearing of the charge of contempt against him) set forth the facts constituting the charge so fully and explicitly that the said Oster was advised, in a general way, at least, of what he would be called upon to meet and answer. Oster was present in court when this order was entered, and there was no necessity the process of attachment should issue against him. *Ex parte Petrie*, 38 Ill. 498. The court had ample power to require him to give bail for his appearance on the 10th day of August,—the day fixed for the hearing of the charge against

him. He appeared on that day, and filed an answer, verified by his oath, which, standing alone, purged him of the alleged contempt, and constituted a full defense to the charge of contempt alleged to have been committed out of the presence of the court. The proceeding for contempt was not for the purpose of enforcing any order of the court or in aid of any civil remedy for the benefit of any injured party. The goods which had been removed from the storehouse occupied by the receiver had been restored, and the only purpose of the attachment was to punish Oster for his alleged participation in the removal of the goods. The proceeding was criminal, not remedial, in character. In criminal contempts alleged to have been committed out of the presence of the court, if the contemnor's answer is sufficient to acquit of the charge he must be discharged. *Cook v. People*, 16 Ill. 534; *Buck v. Buck*, 60 Ill. 105; 4 Enc. Pl. & Prac. 795; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038. The proceeding against Oster is criminal or quasi criminal in character, and independent and distinct from the chancery proceeding under which he was appointed receiver or that instituted by the Reynolds & Reynolds Company and others by intervening petition in such chancery proceeding. It was a distinct and independent proceeding in behalf of the People of the State of Illinois to punish him for an alleged wrongful act done in defiance of the authority and dignity of a judicial tribunal created and existing by virtue of the Constitution and laws of the State. See additional opinion in *Lester v. People*, *supra*. It was correctly docketed in the trial as an independent and distinct cause from the chancery proceeding, and was properly prosecuted by and in the name of the People of the State of Illinois.

The evidence which had been produced before and heard by the chancellor in the cause in equity was not introduced in the hearing of the contempt case, and could not be considered by the court as overcoming the sworn answer filed by Oster, even if it had been competent to controvert his answer. Oster should have been discharged on his answer.

The judgment must be and is reversed. Judgment reversed.

NOTE.—For notes on the procedure, in cases of criminal contempt, see, —11 American Criminal Report 318; also, see, contempt cases on pages 298, 303 and 320 of the same volume.

That part of the opinion which intimates that an affidavit is not an

essential to give the court jurisdiction should be compared with *Lippman v. People* 175 Ill. 101—, 11 Am. Cr. Rep. 356, where it was held that under the Constitution of Illinois no warrant should issue unless based on an affidavit of fact.

STATE V. DAVIS ET AL.

50 W. Va. 100—40 S. E. Rep. 331.

Decided December 14, 1901.

CONTEMPT: Reasonable doubt doctrine applied to a charge of disobeying an injunction—What the rule should show.

On trial of persons charged with contempt in disobeying an injunction, the evidence must be sufficient to establish guilt beyond a reasonable doubt; otherwise the rule should be discharged.

(Syllabus by the court.)

Additional syllabus by J. F. G.

The rule did not set out with sufficient certainty in what manner or respect the defendants violated the injunction. This is fatal, although the point was not raised in the court below.

Supreme Court of Appeals of West Virginia.

Error to Circuit Court, Pleasants County; Hon. L. N. Travner, Judge.

Miles Davis, J. J. Mahoney, and Harry Cheeny convicted of contempt, bring error. Reversed.

Howard & Handlan, for the plaintiff in error.

R. H. Freer, Attorney General, and *Alex. Dulin*, for the State.

DENT, J. Miles Davis, J. J. Mahoney, and Harry Cheeny complain of the judgment of the Circuit Court of Pleasants County, rendered on the 21st day of December, 1899, adjudging them guilty of contempt of such court in violating an injunction thereof prohibiting them from selling intoxicating liquors at a certain house in St. Marys, and sentencing them to six months imprisonment therefor.

The defendants insist that the evidence is wholly insufficient to justify the finding of the court. A careful examination of the evidence, which is too voluminous to set out at length, fully sustains their contention. It proves sales made before, but none made by them or for which they were responsible after, the in-

junction was served. There are some suspicious circumstances, sufficient to raise a reasonable doubt as to their entire innocence, but wholly insufficient to overcome the presumption in their favor and establish their guilt beyond all reasonable doubt. It is shown that some persons unknown did make sales of intoxicants after the service of the injunction at the inhibited place, but the evidence wholly fails to connect such persons in any manner with these defendants. It is also shown that J. J. Mahoney confessed before the mayor of St. Marys, on the 21st day of November, 1899, the day after the injunction was served on him, to ten illegal sales, and was fined therefor, but this, undoubtedly, according to the testimony of the mayor, was for sales made prior to that date, and before service of the injunction.

The Circuit Court evidently failed to give the defendants the benefit of the legal presumptions in their favor, and hence he reached an erroneous conclusion. *State v. Ralphsnyder*, 34 W. Va. 352, 12 S. E. 721; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76.

My associates concur in the reversal of this case and the discharge of the rule, not because of the insufficiency of the evidence, but because the rule does not set out with sufficient certainty in what respect or manner defendants had violated the injunction so as to render themselves liable to the charge of contempt, and this is such error as calls for reversal by this court, although this question is raised here for the first time. *Old v. Commonwealth*, 18 Grat. 915.

The judgment is reversed and the rule is discharged. Reversed.

STATE EX REL REGISTER v. MCGAHEY ET AL.

12 N. Dak. 535—97 N. W. Rep. 865.

Decided December 14, 1903.

CONTEMPT—CRIMINAL COMPLAINT—SEARCH WARRANT—CONSTITUTIONAL LAW: *Not contempt to resist seizure of goods without notice, under a search warrant, and, which warrant was issued upon an affidavit made simply on information and belief.*

1. Resistance willfully offered by any person to the lawful order of the court, is punishable as a criminal contempt, under subdivision 4, § 5932, Rev. Codes 1899. One cannot be convicted under this statute

- of the willful resistance of a search warrant of which he had no notice or knowledge at the time the resistance was made.
2. The order or process of the court, resistance of which, when willfully offered, is punishable as a contempt, must be a "lawful order or process." Consequently resistance of an order or warrant for search, void for want of authority in the court to issue it, is not punishable as a contempt.
 3. In actions for the abatement of liquor nuisances, a search warrant may issue "if an affidavit, shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing it, is kept for sale, or is sold, bartered or given away on the premises, particularly describing the same, where said nuisance is located." An affidavit made upon information and belief, and not otherwise corroborated, does not "state or show" the facts required, and confers no jurisdiction upon the court to issue a search warrant, under section 7605, Rev. Codes, 1899. (Syllabus by the court.)

Appeal from District Court, Burleigh County; Winchester, Judge.

Arthur E. McGahey, convicted of contempt, appeals. Reversed.

J. G. Hamilton and *A. T. Patterson* (*Tracy R. Bangs*, of counsel), for the appellant.

George M. Register, State's Attorney, and *F. H. Register*, for respondent.

COCHRANE, J. Appellant, after hearing, was adjudged guilty of contempt, in that "he willfully resisted the execution of a search warrant [described], and willfully resisted George A. Welch, sheriff of Burleigh County, in making search of the premises, particularly described in said search warrant, in the basement of the Northwest Hotel, in Bismarck, in said Burleigh County," and was sentenced to 30 days' imprisonment in the county jail, and to pay a fine of \$200, and, in case the fine was not paid, then to 30 days' additional imprisonment after the expiration of the first 30 days. He appeals from the judgment. The search warrant, the execution of which he was convicted of resisting, was issued in aid of an equitable action to abate an alleged liquor nuisance, begun by the State's Attorney of Burleigh County, under the provisions of section 7605, Rev. Codes 1899, in which action appellant was named as one of the defendants. The complaint in the action was verified by the affidavit of the State's Attorney, to the effect "that the same is true, to

his best knowledge, information, and belief." The affidavit for search warrant was also made by George M. Register, State's Attorney, and its averments are all made on information and belief, and none of them are sworn to positively. Upon this hearsay foundation an alleged search warrant was issued by the court, directed and delivered to the sheriff of the county, reciting the papers upon which it was based, and commanding the sheriff at the time of serving the injunction to diligently search the premises described, and carefully invoice the articles found therein, and if, upon such search, intoxicating liquors of any kind should be found, to take the same into his custody, and securely hold the same to abide the final order or judgment in the action, and also to take and hold possession of the described premises, and keep the same closed, until final judgment in the action. The sheriff on the night of January 31, 1903, entered a room in the basement of the Northwest Hotel for the purpose of serving the papers in this case upon the defendants named, and otherwise performing the commands of the search warrant. The sheriff thus describes what occurred: "I found the defendant McGahey in one of the rooms of the basement—the third room from the barber shop, east. He was standing alongside the table. There were some bottles partly filled with Val Blatz beer. I reached for a bottle of beer, and took it in my hand. The defendant knocked a glass of beer from the table with one hand, and grabbed the bottle with his other hand, and tried to take this bottle away from me. We both had hold of the bottle, and wrestled for possession for some little time, over chairs, tables, and whatever was in the way. I finally got possession of the bottle. I told him several times to let go of the bottle. I told him I would have him arrested. He did not say anything to me at all. I served the summons, complaint, affidavit, injunction order, and search warrant there after the scuffling was done. From the time I made service of the papers upon McGahey, and until he went out of the basement, he did not do anything—only stand around and talk—and refused to leave the place."

The defendant, in answer to interrogatories propounded to him in the contempt proceedings, testified: That he knew George A. Welch had been elected sheriff of Burleigh County, and had been acting as such since January 5, 1903. That he was served by said sheriff with copies of the summons and complaint, affi-

davit, injunctonal order, and search warrant on the night in question, after, and not before, the supposed resistance testified to by Mr. Welch. That Mr. Welch began to search before he served any papers of any kind, and served the papers after the alleged resistance, when defendant said to him, "If you have a right to search this place, where is your warrant?" Then he handed me the papers, and I took them and placed them on the table." That he did not know that the sheriff had authority to search the premises, and to seize and take into his possession intoxicating liquors found upon the premises. There was a bottle on the table, and both the sheriff and defendant reached for it at the same time. Defendant did not then know that Mr. Welch had any right to the possession of it, as he had shown no papers, nor read any; and defendant testified: "I did not know he was acting in the capacity of sheriff of Burleigh County at that time, and he did not then so state to me. Some of the contents of the bottle spilled in my efforts to regain possession of it." Appellant did not interfere with or resist the officer in the search after being made aware by the sheriff that he was armed with and attempting to execute, a search warrant. None of these statements of the defendant were contradicted. The record clearly shows that appellant, at the time of the acts charged to as a contempt, was in a room in the Northwest Hotel, which the complainant alleges he, with another, "kept, used and maintained" and therefore a place where he had a right to be for all lawful purposes, and a place the sheriff had no right to enter, except on invitation, or unless authorized by legal process, neither of which had been furnished him; that the sheriff entered this room, and sought to take possession of a bottle on the table, without showing that he had any right to enter or to interfere with anything in the room. Appellant naturally resisted the seeming trespass, and exhibited as strong a desire for and hold upon the Val Blatz as did the sheriff, until the law officer wrested it from the possession of appellant; and then appellant was notified that the sheriff was acting officially in the discharge of duty, when all interference on the part of appellant ceased. The acts constituting criminal contempt are classified in Section 5932, Rev. Codes 1899; and the acts of appellant, found to be a contempt in this case, unless within the terms of subdivision 4 of this section, are not punishable as such. The Statute reads as fol-

lows: "Every court of record shall have power to punish as for a criminal contempt persons guilty of any of the following acts and no other: . . . Subd. 4. Resistance wilfully offered by any person to the lawful order or process of the court." The other subdivisions of this section can have no application to the facts of this case; so, if the appellant had not violated the subdivision quoted, his conviction was erroneous and must be reversed.

Assuming for the purposes of the opinion, that a search warrant is an "order of process of court" within the meaning of the statute, the resistance of which may be punishable as a contempt, when it is wilfully offered, and when the order or process is lawful, nevertheless the conviction in this case cannot be sustained. The resistance, under this statute, must have been wilfully offered. The term "wilful," when applied to the intent with which an act is done, implies a purpose or willingness to commit the act. Section 7713, Rev. Codes 1899; *Freeman v. City of Huron*, 8 S. D. 438, 66 N. W. 928. It goes without saying that one cannot form the purpose to resist an order or warrant of which he has no knowledge or notice whatever. The uncontradicted evidence in this case shows that appellant had no notice or knowledge that the sheriff was armed with the warrant when he seized and sought to retain possession of the bottle. The sheriff had not exhibited his warrant, or made any mention that he had one in his possession, or that he was acting under its authority. The resistance, therefore was no resistance of the warrant, wilfully made. *Horan v. State*, 7 Tex. App. 183; *Johnson v. State*, 26 Tex. 117; *U. S. v. Tinklepaugh*, 28 Fed. Cases, 193; *State v. Downer*, 8 Vt. 424; 30 Am. Dec. 482; *State v. Carpenter*, 54 Vt. 551; *State v. Phipps*, 34 Mo. App. 400.

The conviction in this case was erroneous for the further reason that the order or warrant which appellant is accused of having resisted was not a lawful order or warrant. It was issued without authority of law, and was wholly void. The only authority for a search warrant in actions to abate liquor nuisances is found in section 7605, Rev. Codes 1899. The pertinent part of that section reads as follows: "The Attorney General, his Assistant State's Attorney, or any citizen of the county where such nuisance exists or is kept or is maintained, may maintain an action in the name of the State to abate and perpetually en-

join the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint of both, may be made by the State's Attorney, Attorney General or his assistant, upon information and belief; and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing the same, is kept for sale, or is sold, bartered or given away on the premises particularly describing the same where said nuisance is located contrary to law, the court or judge must at the time of granting the injunction issue his warrant commanding the officer serving said writ of injunction at the time of such service to search diligently the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business . . . If such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind, he shall take the same into his custody and securely hold the same to abide the final judgment in the action, and such officer shall also take and hold possession of all personal property found on such premises and shall take and hold possession of such premises, and keep the same closed until such final judgment". No authority is found in this statute for the issuance of the search warrant unless an affidavit is presented to the court "stating or showing that intoxicating liquor, particularly describing the same, is kept for sale." The affidavit presented to the court in this case did not state or show the required facts, but merely stated that the State's Attorney was informed and believed that the facts did exist. The affidavit is uncorroborated. It does not give the name of the person furnishing the information makes no statement as to where or how the information and belief was obtained, or on what information his belief was founded, or whether it was such information as would inspire belief in the mind of a less credulous person. It is mere hearsay and opinion. Judge Cooley, for the Supreme Court of Michigan, thus characterized this form of accusation: "Charges are not verified by an affidavit that somebody is informed and believes they are true. This is mere evasion of the law. The most improbable stories may be believed of anyone, and the man most free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man, miles off, who

will swear that he has been informed and believes in his guilt. It is easy to tell falsehoods, and those who are least fitted to judge of their credibility are generally the very persons who will believe them because they are told. But to substantiate charges, within the meaning of the law, evidence is required, and not merely suspicions or information or beliefs." *Swart v. Kimball*, 43 Mich. 451, 5 N. W. 635. This court, in *Kappeler v. Bank*, 8 N. D. 411, 79 N. W. 871, said: "As the application for the arrest is an *ex parte* proceeding, and as it is in derogation of personal liberty, the least that can be required is that the applicant make an undoubted *prima facie* case. Under well-settled general principles, this cannot be done, in the absence of statutory sanction, by an affidavit based upon information and belief, for the very evident reason that such affidavit is not competent evidence. It is mere hearsay. If the affiant were on the stand, he would not be permitted to testify to any such matter, and he certainly would be equally restricted in an *ex parte* affidavit, where he is subjected to no cross examination; and so are the authorities." Such an affidavit is without statutory sanction. Upon the plainest rules of statutory construction, an affidavit for a search warrant is required to be made by one with knowledge of the facts, and by positive and unqualified statements of their existence. This is shown by the fact that the legislature, in the same clause of the statute, authorizes the issuance of an injunction and search warrant in one action, and at the same time, and provides that when the affidavit or complaint for injunction is made by the State's Attorney, Attorney General, or his assistant, it may be made on information and belief, but omits the affidavit for search warrant from mention in the proviso; thus impliedly declaring that information and belief will not support a search warrant. *Suth. Stat. Const.* §§ 325, 327.

It may well be doubted whether it is within the power of the legislature to authorize the issuance of search warrants upon mere affidavit or complaint made upon information and belief. The Constitution, § 18, declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath

or affirmation, particularly describing the place to be searched and the persons and things to be seized." Under a similar guaranty, the Supreme Court of Illinois have held it beyond the power of the legislature to authorize a search warrant to issue upon a complaint or affidavit which is merely hearsay. *Lippman v. People*, 175 Ill. 101, 51 N. E. 872, (11 Amer. Crim. Rep. 356). In *Re Dana* (D. C.) 68 Fed. 895, it is said: "The fundamental requirements of the fourth amendment [of the Federal Constitution, similar to section 18, *supra*] are that the facts and circumstances tending to show criminality shall be made to appear to the magistrate on oath, whether upon examination by the magistrate himself, or by affidavit or deposition, and that the magistrate must himself find in the facts thus shown sufficient probable cause, independent of the belief of other persons." In *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, the court, in dealing with the complaint made upon information and belief, said: "The Constitution itself requires a showing of cause before a warrant shall issue. The arrest in this case would therefore have been unwarranted, even if the law had been valid." See, also, *State v. Davie*, 62 Wis. 305, 22 N. W. 411; In *re Rule of Court*, 20 Fed. Cas. No. 12,126. Under statutes requiring facts to be shown by affidavit as a condition precedent to the issuance of orders or the granting of specific relief, an affidavit of the matter, stated on information and belief of the party making it, will not be treated as a compliance with the statute. Such an affidavit will not support an injunction. *City of Atchison v. Bartholow*, 4 Kan. 124; *Roome v. Webb*, 3 How. Prac. 327; *Smith v. Reno*, 6 How. Prac. 124; *Hecker v. Mayor*, 28 How. Prac. 211; *Bostwick v. Elton*, 25 How. Prac. 362; *Woodruff v. Fisher*, 17 Barb. 224. It will not authorize an arrest in a civil case. *Kæppler v. Bank*, 8 N. D. 406, 79 N. W. 869; *Hart v. Grant*, 8 S. D. 248, 66 N. W. 322; *Sheridan v. Briggs*, 53 Mich. 569, 19 N. W. 189; *Shaw v. Ashford*, 110 Mich. 534, 68 N. W. 281; *Ex parte Fukumoto*, 120 Cal. 316, 52 Pac. 726; *Ex parte Vinich*, 86 Cal. 70, 26 Pac. 528; *People v. Smith* (Sup.) 10 N. Y. Supp. 589; *Finlay v. De Castroverde* (Sup.) 22 N. Y. Supp. 716; *Ammon v. Kellar* (Sup.) 47 N. Y. Supp. 595. It will furnish no foundation upon which to build a proceeding for constructive contempt. *Freeman v. City of Huron*, 8 S. D. 435, 66 N. W. 928; *Thomas v. People*, 14 Colo. 254, 23 Pac.

326, 9 L. R. A. 569; *Young v. Cannon*, 2 Utah, 560; *Herdman v. State*, 54 Neb. 626, 74 N. W. 1097, (11 Amer. Crim. Rep. 298); *Batchelder v. Moore*, 42 Cal. 412. It will not sustain a warrant of arrest of one thus accused of crime. *State v. Boulter* (Wyo.) 39 Pac. 883; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619; *People v. Heffron*, 53 Mich. 527, 19 N. W. 170; *State v. Gleason*, 32 Kan. 250, 4 Pac. 363 (5 Amer. Crim. Rep. 172); *U. S. v. Tureaud* (C. C.) 20 Fed. 621; *U. S. v. Polite* (D. C.) 35 Fed. 59 Johnson v. U. S., 87 Fed. 187, 30 C. C. A. 612 (11 Amer. Crim. Rep. 349). Neither can such an affidavit, made upon information and belief, furnish the basis for a search and seizure, in the face of the Constitution and statutory safeguards hereinbefore quoted. The affidavit for search warrant did not state or show the facts required by statute to be shown as a foundation for search warrant, and gave no jurisdiction to the court to issue it, and the warrant was therefore void. *State v. Wimbush*, 9 S. C. 309; *Fisher v. McGirr*, 61 Am. Dec. 381; *Hauss v. Kohlar*, 25 Kan. 640; *Curnow v. Kessler*, 110 Mich. 10, 67 N. W. 982; *People v. Pratt*, 22 Hun, 300; *People v. Heffron*, 53 Mich. 527, 19 N. W. 170; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619; *State v. Davis*, 2 N. D. 461, 472, 51 N. W. 942. The warrant being void for want of authority in the court to issue it, resistance of it could not be a contempt, under the statute. In *re McCain*, 9 S. D. 57, 68 N. W. 163; *Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853; *Com. v. Perkins*, 124 Pa. st. 36, 16 Atl. 525, 2 L. R. A. 223; *State v. Milligan*, 3 Wash. 144, 28 Pac. 369; *Schwartz v. Barry*, 90 Mich. 267, 51 N. W. 279; *State v. Circuit Court*, 98 Wis. 143, 73 N. W. 788; *Smith v. People*, 2 Colo. App. 99, 29 Pac. 924; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Weber v. Weber*, 90 Wis. 467, 63 N. W. 757; *State v. Davis*, 2 N. D. 461-472, 51 N. W. 942.

The judgment appealed from is reversed. All concur.

NOTE (By J. F. G.).—Several of the above citations appearing in the *American Criminal Reports*, we have inserted bracket citation to that effect, and, to which we would refer the reader. The subject of *Criminal Complaints*, is treated of extensively, in both cases and notes, in 11 Amer. Crim. Rep. 349 to 385 and 12 Amer. Crim. Rep. 356 to 366. Notes in 11 Amer. Crim. Rep. 369—380 and 382—383 are of special value.

In addition to the cases cited in the above opinion upon the subject of *Affidavits on Information and Belief*, the following are valuable authorities:—*Rice v. Ames*, 180 U. S. 377, 21 Sup. Ct. Rep. 406, 47 Law Ed. 577, 12 Amer. Crim. Rep. 356; *Ex parte Hart*, 11 C. C. A. 165, 63 Fed. Rep. 249; *U. S. v. Sapinkow*, 90 Fed. Rep. 654; *U. S. v. Collins*, 79 Fed. Rep. 65; *Ex parte Morgan*, 20 Fed. Rep. 298; *Ex parte Lane*—6 Fed. Rep. 34; *Ex parte Smith*, (*The Mormon Prophet's Case*) 3 McLean 121; *Shustek's Case*, 11 Amer. Crim. Rep. 372.

An affidavit which does not state facts sufficient to constitute a crime, does not give jurisdiction for the issuance of a warrant; nor is one failing to set forth fact showing a cause for an arrest in a civil case, a basis for a *causas ad respondendum*. In either of such cases the process is void. *Armstrong v. Van de Vanter* 21 Wash. 682, 59 Pac. Rep. 510, 12 Amer. Crim. Rep. 327; *Ex parte Smith* 16 Ill. 347; *Stafford v. Low*, 20 Ill. 152; *Housh v. People*, 75 Ill. 487; *Sarah Way's Case*, 41 Mich. 299, (Reported as *In re May*, 1 N. W. Rep. 1021). This same doctrine applies to those on information and belief, as well appears by the above opinion and cases cited.

SCOTT ET AL V. STATE.

109 Tenn. 390—71 S. W. Rep. 824.

Decided October 8, 1902.

CONTEMPT—PRACTICE: *Contempt in preventing a witness from appearing before the grand jury—Apparently by mistake a subpoena for another witness appears in the record; so instead of a final reversal the cause is remanded, that another hearing may be had in the court below—Questions of practice passed upon.*

1. It is contempt of court to willfully and knowingly decoy witness, duly subpoenaed, out of the State.
2. Slight irregularities and technicalities in the manner of issuing or serving a subpoena, which might excuse the witness, if he was proceeded against for failure to attend, will not avail as a defense in favor of who knowing that the person is a witness, legally and willfully decoys the witness beyond the jurisdiction of the court.
3. The record not showing any subpoena for the witness, and, that being essential, under the statute in contempt cases of this class the judgment is reversed; as a subpoena for another witness, appears in the record, evidently placed there by the clerk or the court below by mistake, the case is remanded that another hearing in the court below may be had.
4. A petition in writing is not necessary as a basis for an attachment for contempt of court; but if an affidavit or affidavits are presented, showing facts sufficient to constitute contempt of court, an oral motion for an attachment for contempt is sufficient.

5. The affidavit in the present case, being meager, may be amended in the court below, so as to more fully show the facts.
6. "The action of the court upon the motion and affidavit, in awarding or denying the attachment, should substantially appear in the order of the court on the motion, and this order should recite the substance of the motion granted or denied; also, briefly the substance of the charge contained in the affidavit, but not its evidentiary details; and the substance of the order should appear in the attachment writ, if awarded."

Supreme Court of Tennessee.

Appeal from Circuit Court, Hamilton County; Hon. Floyd Estill, Judge.

J. W. Scott and another, convicted of contempt of court, appeal. Reversed.

Joe V. Williams and Shepherd & Frierson, for the appellants.
Charles T. Cates, Jr., Attorney General, for the State.

NEIL, J. The defendants were tried in the court below upon a charge of contempt of court. The charge, in substance, was that one Charley Johnson had been *subpœnaed* by the State to appear and give his testimony before the grand jury in the case of the State against Ed Royston, who had been bound over on a charge of forgery; that the defendants, knowing the said Charley Johnson had been so *subpœnaed*, decoyed him out of the State of Tennessee, and into the State of Alabama, with the purpose of preventing his appearing as a witness in the said case.

The defense made was that the said Charley Johnson had not been lawfully *subpœnad* as a witness in the case referred to; and thereunder were the following specifications: (1) That the *subpœna* alleged to have been issued appears, from the face of the affidavit which is the foundation of the present proceeding, to have required the said Charley Johnson to appear before the grand jury, and not before the court to give evidence before the grand jury; (2) that the affidavit shows that the *subpœna* was issued in vacation, without showing that it was issued upon the request of the Attorney General of the district; (3) that the affidavit shows that the *subpœna* required Charley Johnson to appear upon the second day of the term, and not upon the first day; (4) that it does not appear that any *subpœna* was ever issued at all; (5) it does not appear that any *subpœna*, if issued, was legally served.

Leaving out of view these technical defenses, the testimony clearly shows that the defendants are guilty, that they supposed the *subpoena* was in every respect a legal one, and that under that belief they decoyed the witness out of the State. Under such a state of facts the court is not inclined to give technical objections any more weight than they are entitled to *strictissimi juris*.

As to the first, second, third, and fifth grounds, whatever weight they might be entitled to if relied upon by a witness who was being proceeded against for a failure to attend, we think they should be given no weight at all when put forward as defenses by persons under prosecution for decoying the witness away, when it appears, as in the present case, that the witness himself recognized the binding force of the *subpoena*.

The fourth ground, however, must be sustained, because instead of setting out the *subpoena* in the case of the State against Ed Royston, the bill of exceptions contains a *subpoena* in the present case, and one, moreover, not for Charley Johnson, but for one Charley Hardy. The language of the bill of exceptions, referring in terms to the proper *subpoena*, however, convinces us that the one now appearing in the record was inserted by a mistake of the clerk of the court below. Nevertheless, the judgment of that court must be reversed on this ground; because, if in fact no *subpoena* for Charley Johnson was ever issued, he could not be made a legal witness, and so bound to appear (*Hatfield's Case*, 3 Head, 233); and the defendants, in that view, committed no contempt of court in inducing him to leave this State and go into the State of Alabama to keep from testifying. It is unnecessary to determine whether the facts stated would support an indictment, as the matter before us is whether these facts would make out a case of contempt of court, this being a contempt proceeding. That they would not support a charge of contempt is shown by the fact that the power of the courts of this State to punish for contempt is limited to the cases laid down in Shannon's Code, § 5918, subsecs. 1 to 6 inclusive. These are as follows: "(1) The wilful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; (2) the wilful misbehavior of any of the officers of said courts, in their official transactions; (3) the wilful disobedience or resistance of any officer

of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of said courts; (4) abuse of, or unlawful interference with, the process of proceedings of the court; (5) wilfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; (6) any other act or omission declared a contempt by law." The sixth subsection has been decided to be applicable to only such acts or omissions as may be declared by statute to be contempts, and so does not apply. The only other subsection which could have any possible bearing upon the facts stated is the fourth one. But that subsection cannot apply, because, on account of the absence of the subpoena, it is not shown that there was any process issued which was interfered with.

So, however strong the purpose of the defendants was to commit the contempt, and how willingly soever they entered upon and executed a plan which they thought was the placing beyond the jurisdiction of the court of a witness who, as they believed, had been subpoenaed to go before the grand jury, yet, because this record, as it stands, does not show that the supposed witness was a real witness, in a legal sense, the conviction cannot be sustained. But under the circumstances we do not think the defendants should be discharged. As already stated, it seems most probable that by a mere oversight the wrong subpoena got into the bill of exceptions. In view of this fact, and the strong proof of the defendants' guilt otherwise, the case should be remanded for a new trial, rather than disposed of finally here, as might be done in this kind of case. Attempts to interfere with the pure and efficient administration of justice in the courts of the country merit the severest condemnation and punishment, and persons charged therewith, and whom the facts show to be morally guilty, cannot be allowed to escape punishment on mere technicalities, when the record shows, or can legally be made to show, that the substantial requirements of the law have in other respects been complied with in the proceedings which such persons have sought to divert. All such charges should have the fullest investigation.

The defendants' counsel have furnished the court with a learned and able brief upon the form of the pleadings required in contempt proceedings. We do not deem it necessary to go

into this matter at any length. The general form of the proceeding as instituted is correct; that is, an affidavit and an attachment. Undoubtedly, the affidavit, or, if more than one, then all of the affidavits together, should make out a *prima facie* case of contempt; and the application for the attachment should be based on such affidavit or affidavits. In the present case the affidavit is meager, but on the remand it may be amended in such way as to more fully state the facts.

We do not think that a petition is at all necessary. An oral motion based on the affidavit is sufficient. The action of the court upon the motion and affidavit, in awarding or denying the attachment, should substantially appear in the order of the court on the motion and this order should recite the substance of the motion granted or denied; also briefly the substance of the charge contained in the affidavit, but not its evidentiary details; and the substance of the order should appear in the attachment writ if awarded. This brief and simple practice is the one which the court recognizes as having been long in use in this State, and is altogether sufficient for the purposes of the inquiry.

Let the judgment be reversed and remanded as above indicated.

IN RE ODUM.

133 N. C. 250—45 S. E. Rep. 569.

Decided October 27, 1903.

CONTEMPT: *Voluntary answer under oath waives affidavit—Necessity to set out findings in the record—Tampering with jurors—Statutory provisions relating to contempt of court.*

1. The basis of a contempt proceeding should be an affidavit, but this requirement may be waived by the respondent, at his own request, being sworn, and in that form making answer that he has committed contempt of court.
2. The evidence and admissions proved a contempt of court by unlawful interference with jurors trying a case; but in its findings, the court failed to sufficiently set out the facts together with the purpose and object of the contemnor.
3. "Before the Act of 1870 -'71 (The Code, sec. 648), the matter set out in the judgment would have been constructive contempt of court, but that Act excluded the offense mentioned in the judgment from the list of contempts, by mentioning specifically what acts should thereafter constitute contempt and excluding all other acts."

Appeal from Superior Court, Sampson County; Hon. R. B. Peebles, Judge.

S. D. Odum convicted of contempt of court, appeals. Reversed.

J. D. Kerr and *G. E. Butler*, for respondent.

No counsel, *contra*.

MONTGOMERY, J. It was said in *In re Deaton*, 105 N. C. 59, 11 S. E. 244, that proceedings as for contempt should be based on affidavits. In the case before us that course was not pursued, but the contemnor, Odum, waived any rights he may have had by being sworn, at his own request, and making answer in that form to the charge that he had committed a contempt of court. But there is another irregularity in the proceedings, which will preclude us from affirming the judgment of the court below, although from a perusal of the record we are satisfied that the contemnor deserved the sentence which was imposed. His Honor failed to find the facts in the premises at the time he pronounced the judgment. There was evidence, and also admissions, to the effect that during the trial of a civil action before his Honor Judge Peebles, in the Superior Court of Sampson County, at its February term, 1903, in which the contemnor, Odum, was the defendant, he invited to his home one of the jurymen, Edward S. Herring, and entertained him all night; that he was seen with another one of the jurors, M. R. Mathis, alone and in a secluded place, on the next morning before the court convened; that the action was in debt, and the defendant's plea was that the judgments sued upon were on their face fraudulent and void; that his Honor instructed the jury that there was no evidence of fraud, either upon the face of the judgments or otherwise, and that, if they believed the evidence, they should find the issues in favor of the plaintiff; that the jury were expected to make a prompt return, but, remaining out some time, they were sent for, and asked by the court what the difficulty was; that Mathis replied that they could not agree as to how they had been instructed to find the first issue; that his Honor told them again that, if they believed the evidence, to answer the first issue, \$109.40, and put the amount in pencil on the margin of the paper on which the issues were written; and that in a

short while the jury returned with their verdict, and through their foreman, Herring, answered \$7.50 to the first issue.

If a finding of these facts had been made upon the evidence, and then a further finding of fact that it was the intention and purpose of Odum to corruptly and unlawfully influence the verdict of Herring and Mathis, we would deem the findings justified by the evidence, and would affirm the judgment. It was a case of unlawful interference with the proceedings in an action, and was punishable as for contempt under subsection 3 of section 654 of The Code.

It is true that in the judgment Odum's conduct was set out, but that was not sufficient. The facts should have been found and filed in the proceedings—especially that fact concerning the purpose and object of the contemnor—and the judgment should have been founded on those findings. The judgment was in the following words: "It appearing to the court that the action of Ira L. Kelly, as administrator of T. B. Bird, plaintiff, against Samuel R. Odum and others, defendants, was commenced on the 26th day of February, 1903, and that after the jury were impaneled in said case, and charged not to talk about the case among themselves, nor allow any one else to talk about it in their presence, the court took a recess until 9:30 a. m. February 27, 1903, and that Samuel R. Odum carried Edward S. Herring, one of the jurors, on (in)* his buggy, to Odum's house, and kept him there all night, and brought him back to court on February 27, 1903, and that, before court met on February 27th, said Odum and one M. R. Mathis, another juror, were seen walking together through an alley in the town of Clinton. It is therefore considered and adjudged that said Samuel R. Odum, Edward S. Herring, and M. R. Mathis are in contempt of court, and it is further considered and adjudged that said Samuel R. Odum and Edward S. Herring be confined in the county (jail)† for 30 days each, and that said Mathis pay a fine of \$20."

Before the Act of 1870-71, (The Code, § 648), the matter set out in the judgment would have been a constructive contempt of court; but that act excluded the offense mentioned in the

*In the official report the word is "on;" but it is "in" in the S. E. Reporter.

† In the official report the word "jail," does not appear; but it does in the S. E. Reporter.

judgment from the list of contempts, by mentioning specifically what acts should thereafter constitute contempt, and excluding all other acts.

It is not necessary for us to discuss the appeal of Mathis and Herring, for, before the appeal was taken, they had paid into court the fines imposed by his Honor. A fine of \$100 was, after the judgment, imposed upon Herring in lieu of the sentence of imprisonment.

We reverse the action of his Honor with reluctance.

Reversed.

WISE v. COMMONWEALTH.

97 Va. 779—34 S. E. Rep. 453.

Decided November 23, 1899.

CONTEMPT: *Attorney absent from court because of being engaged in a trial in another court—Conflicting duties—Good faith.*

1. It is not contempt of court for an attorney to fail to appear at the time previously set for the trial of a case, when he is in good faith engaged in the trial of a case in another court, even though it be a court of less jurisdiction. His duty was to remain at the trial already in progress.
2. In the present case the attorney endeavored to have the case he was trying postponed, and failing in this telephoned the reason of his absence showing in all his conduct a due respect for each of the courts.

Error to County Court of Henrico County.

George E. Wise, fined for contempt of court brings error,
Reversed.

Coalter & Wise, and William S. Royall, for the plaintiff in error.

A. J. Montague, Attorney General for the Commonwealth.

KEITH, P. This is a writ of error to a judgment of the County Court of Henrico County, imposing a fine of \$20 upon George E. Wise, an attorney at law practising in said Court, for an alleged contempt of court committed by him. The facts stated in the bill of exceptions are as follows:

On Monday, the 12th day of December, 1898, there was upon the docket of the County Court of Henrico the case of *Commonwealth v. Robert Green*, upon an indictment for felony. At the November term of the court the case had been continued, and, with the consent of the plaintiff in error, had been set for trial on the 12th day of December. Upon that day the prisoner

was arraigned, and the court was in readiness to proceed with the trial, but Wise, the counsel for the prisoner, did not appear, and, upon being called, did not respond. The court waited for counsel from eleven o'clock until half past one o'clock p. m. at which time Wise appeared, and was given leave to explain his absence, and stated that he was unavoidably detained in the trial of a case in the Police Court of the City of Richmond which was called for trial about ten o'clock that morning, and which counsel believed and had good reason to believe, would be concluded in ample time to enable him to keep his engagement in the County Court at eleven o'clock; that, upon discovering that the hour of eleven was approaching he communicated by telephone with the Commonwealth's attorney of Henrico County, at the court house, explaining that he was engaged in the Police Court, and asking him to so inform the judge of the County Court, and pray indulgence if the same should be found necessary; that the plaintiff in error then returned to the court room of the Police Court, and asked a continuance of the case on trial in order that he might attend upon the County Court, which request was declined, as the Police Justice stated that it was his rule not to continue a case after the evidence had been partly heard, and, further, that the condition of the docket of the Police Court was such as rendered the present disposal of the case necessary; that the plaintiff in error then again telephoned to the attorney for the Commonwealth, explaining his enforced delay, and asking the indulgence of the court until he could get away from the Police Court; that he then returned to the Police Court, and disposed of the trial there as quickly as possible, and went immediately to the County Court, but the County Court, not considering the reasons for the delay sufficient, imposed a fine upon the plaintiff in error of \$20 for contempt of court.

We are of opinion that the facts certified do not warrant the judgment. There is nothing in the facts stated to give color to the suspicion that, in what he did, plaintiff in error intended the slightest contempt of, or disrespect to, the lawful authority of the County Court. It is true that the case was fixed for trial in the County Court with his consent, and it is true that he subsequently made an engagement which compelled him to make a choice between duties, both of which he could not at the same time perform; but it appears that he in good faith entered upon

the trial of the case in the Police Court in the reasonable expectation that it would be completed in time to enable him to keep his appointment as counsel in the case of *Commonwealth v. Green*, pending in the County Court of Henrico. Having entered upon the trial of the case in the Police Court with this reasonable expectation, and being unable to procure any indulgence in that court, he would have been guilty of a more serious offense—if offense it be—against the Police Justice than that with which he is charged by the County Court, for, if it were an offense not to keep an engagement to be present and proceed with the case set for trial with his consent a month before, it would have been a far more serious violation of his duty to his client and to the Police Court to abandon a trial already begun in that tribunal. He was, therefore, placed in the position, if the judgment of the County Court be sound, of being punished for an election between inconsistent duties, whatever his choice might have been. The whole tenor and spirit of his conduct, when he found himself thus embarrassed, is marked, not by a disposition to be guilty of a contempt of the jurisdiction of any court, but disclosed a courteous and respectful consideration for each of them. The County Court might very properly have pursued the one or the other of two courses. It might have continued the case to another day, or to a succeeding term, or it might have proceeded with the trial in the absence of plaintiff in error, but it could not punish for a contempt of court when it is manifest that no contempt of its authority was intended, and when the facts of the case are not only consistent with innocence of any offense, but are indeed inconsistent with any other hypothesis.

The judgment of the County Court must be reversed.

Reversed.

RICKETS v. STATE.

111 Tenn. 380—77 S. W. Rep. 1076.

Decided November 28, 1903.

CONTEMPT—MERGER: *Intimidating and corrupting a witness—Contempt does not merge in subornation of perjury.*

1. It is contempt of court to, wilfully, by persuasion or threats cause a witness to testify falsely.

2. A contempt of this kind does not merge in the graver crime of subornation of perjury.

Supreme Court of Tennessee.

Error to the Criminal Court, Hamilton County; Hon. S. D. McReynolds, Judge.

Augustus Rickets convicted of contempt of court, brings error. Affirmed.

W. H. Cummings and *Robert T. Cameron*, for the plaintiff in error.

The Attorney General for the State.

SHIELDS, J. Plaintiff in error, upon petition of the District Attorney charging him with contempt of court, was attached, tried, and convicted, and adjudged to pay a fine of \$50 and undergo confinement in the county jail for a term of ten days, from which judgment he has prosecuted an appeal in the nature of a writ of error to this court, and assigns error.

The conduct of plaintiff in error alleged in the petition as constituting the contempt of which he was found guilty consists of his action in procuring a witness for the State in a prosecution against him in said court for tippling to falsely testify that a sale of liquor made by plaintiff in error to the witness, and then being inquired into, occurred more than twelve months before the indictment was preferred, so as to make the same appear to be barred by the statute of limitation applicable to such offense, when in fact the sale was made within that time.

The witness was induced to give this false testimony by persuasion and threats of personal violence upon the part of the plaintiff in error before the trial.

The first contention of plaintiff in error is that the facts stated do not constitute contempt of court within the statutes upon this subject.

It is unsound. A case of unlawful abuse of and interference with the process and proceedings of the court within section 5918, subsec. 4, of the Code (Shannon's Ed.), is clearly presented.

Anything done for the purpose of preventing a witness duly subpoenaed from attending court, or, when in attendance, from testifying to the truth and the whole truth, constitutes a contempt under the statute of the most serious and hurtful character,

which should always be vigilantly inquired into and severely punished.

It is difficult to conceive of a more willful and corrupt interference with the process and proceedings of a court of justice than is here presented. Contemnor not only interfered with and prevented the witness then under subpoena from testifying the truth, but practically in the presence of the court caused him to commit the crime of perjury, thus in the most effective way obstructing its proceedings and the administration of justice. Inducing a witness to absent himself from court, as was done in *McCarthy v. State*, 89 Tenn. 543, 15 S. W. 736, is a mild offense compared to that here disclosed.

Again, it is said that the smaller offense of contempt is merged in the greater one of subornation of perjury, and that it cannot be punished. This position is also untenable. The offenses are entirely distinct and independent. They are created upon different principles, for different purposes, are tried and punished differently, and a conviction or acquittal of one is no bar in a prosecution for the other.

This seems to be well settled by the authorities. 7 Am. & Eng. Ency. of Law (2d Ed.) 66, 4 Pl. & Pr. 794; *U. S. v. Debs*, (C. C.) 64 Fed. 724; *Yates v. Lansing*, 9 Johns, 417, 6 Am. Dec. 290.

The judgment is affirmed, and the case remanded that it may be executed.

O'NEAL v. UNITED STATES.

190 U. S. 36—47 L. Ed. 945—23 Sup. Ct. Rep. 776.

Submitted May 4, 1903.—Decided June 1, 1903.

CONTEMPT OF COURT—JURISDICTION ON U. S. SUPREME COURT ON WRIT OF ERROR.

O'Neal was charged by affidavit with contempt of court, in assaulting a trustee in bankruptcy, on which a rule to show cause issued. A demurrer by O'Neal being overruled, he answered and evidence, on both sides, was heard, resulting in a conviction. A writ of error was then sued out from the Supreme Court, *Held*:

1. The matter was one of merits and not of jurisdiction, *hence*, the writ did not lie.
2. The judgment being in effect, a judgment in a criminal case, the writ would not lie.

Supreme Court of the United States.

Writ of error to the District Court of the United States for the Northern District of Florida. Dismissed.

Mr. W. A. Blount for the plaintiff in error.

Mr. B. C. Tunison for the defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court.

This was a proceeding in the District Court of the United States for the Southern District of Florida, commenced by the filing of an affidavit of Greenhut, a trustee in bankruptcy, charging W. C. O'Neal with contempt of court in committing an assault upon him.

A rule to show cause was entered and served on O'Neal, to which he filed a demurrer, assigning as grounds that the affidavit did not show that respondent had committed any offence of which the court had jurisdiction, or had done any act punishable by the court as a contempt thereof; or had committed any act of contempt against the court.

The demurrer was overruled and O'Neal answered. Hearing was had on the rule and answer, and evidence introduced on both sides, and the court found respondent guilty of the acts and things set forth in the affidavit, and that they constituted a contempt of court, and thereupon sentenced O'Neal to imprisonment in the county jail at Pensacola, Florida, for the term of sixty days.

The District Court certified the question of its jurisdiction for decision, and a writ of error directly from this court was allowed on the assumption that the case came within the first of the six classes of cases enumerated in section 5 of the judiciary act of March 3, 1891. That class embraces cases "in which the jurisdiction of the court is in issue," that is, where the power of the Circuit and District Courts of the United States to hear and determine is denied. *Smith v. McKay*, 161 U. S. 355; *Pance v. Vandercook Company*, (No. 2.) 170 U. S. 468, 472; *Mexican Central Railway Company v. Eckman*, 187 U. S. 429, 432.

But the question here is asserted in the certificate to be whether the District Court had "jurisdiction to try and punish the said defendant for contempt thereof, upon the facts and for the causes stated in said rule and affidavit."

Jurisdiction over the person and jurisdiction over the subject matter of contempts were not challenged. The charge was the commission of an assault on an officer of the court for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out.

In other words the contention was addressed to the merits of the case and not to the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided. *Louisville Trust Company v. Cominger*, 184 U. S. 18, 26; *Ex parte Gordon*, 104 U. S. 515.

And while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. Section 5, act of March 3, 1891, 26 Stat. 826, c. 517, as amended by the act of January 20, 1897, 29 Stat. 492, c. 68; *Chetwood's Case*, 165 U. S. 443, 462; *Tinsley v. Anderson*, 171 U. S. 101, 105; *Cary Manufacturing Company v. Acme Flexible Clasp Company*, 187 U. S. 427, 428.

Writ of error dismissed.

PEOPLE V. HOAGLAND ET AL. (MYERS, APPELLANT.)*

138 Cal. 338—71 Pac. Rep. 359.

Decided January 17, 1903.

CORROBORATION OF ACCOMPLICE: *Failure to corroborate.*

A conviction for grand larceny cannot be sustained, where the only testimony relating to the offense charged is that of the accomplice, uncorroborated by any other evidence, and whose testimony, if believed, tended to show the absence of union of act and intent required to be present in every crime.

Commissioners' Decision. Department 2. Appeal from Superior Court, Mendocino County; Hon. J. M. Mannon, Judge.

Albert Meyers, convicted of larceny, appeals. Reversed.

See 69 Pac. 1063.

Waldon & Held, for the appellant.

Tirey L. Ford, Attorney General, *A. A. Moore, Jr.*, Deputy

* This case appears in the California report as follows: THE PEOPLE, Respondent, v. GEORGE HOAGLAND et al., Defendants; ALBERT MEYERS, Appellant.

Attorney General, *W. G. Roage*, District Attorney, and *J. Q. White*, for the State.

CHIPMAN, C. Albert Meyers, appellant, was informed against with two other defendants for the crime of larceny committed by stealing a cow from one Lacy Gray, in Trinity County, and driving said cow to Mendocino County, and there selling her. Appellant was granted a separate trial, and was found guilty. He appeals from the judgment of conviction, and from the order denying motion for a new trial.

It is claimed that the evidence is insufficient to justify the verdict. We entirely agree with defendant in this contention. It appears that Gray missed a cow early in January, 1902, and employed one Vann to find her. Vann testified: That he learned that some cattle had been driven out of the neighborhood. He took the trail, and followed it to defendant French's house. The tracks did not follow well-known trails, but kept away from them over a rough country. He lost the tracks here, but afterwards found tracks, and traced them to Hale's place, towards Covelo. He followed no further, but afterwards found Gray's cow in Round Valley, where French had sold her and five other cattle to one Al Want. Witness Wyrick testified that he was trapping "on the opposite side of the ridge from Yellow Jacket's [French's house]," but had never seen the house. He testified in chief as follows: "I remember seeing some parties driving cattle out of that country last January. I was about 50 or 75 yards from them. They were driving five or six head. I only recognized them in my own mind. Their backs were to me. And I thought that I recognized one as being Yellow Jacket, but the other one I could not tell. Yellow Jacket is an Indian. I had never seen Albert Meyers, the defendant, before. I have seen him since in Round Valley. It was at the time of the preliminary examination of this case. After seeing him in Round Valley, I could not say positively that I could recognize him, because I did not know him. After seeing him in Round Valley, I thought he was one of the parties driving the cattle. There were two parties driving the cattle. I met Bob Hoaglen (Hoagland)*

* The name, Hoagland, is placed in parentheses, because it is the name as used in the Pacific Reporters, throughout the entire opinion, while in the 138 California, except in one instance, the name is printed as: Hoaglen.

about 150 yards from there." On cross-examination he testified: "I am not positive that this defendant [Meyers] is the man that I saw out there that day driving cattle. I will not swear now positively that it is this defendant. Only through my mind. That is all the way I formed an opinion. I never saw his face out there. I have never seen his face." He testified that he did not know the cattle; that Meyers and French were driving away from him, and their backs to him some distance off; and he testified that he was not certain that French was one of the men. Witness Al Want testified that he bought the cattle about two miles from Covelo; that Hoaglen (Hoagland) came to him first and asked him if he wanted to buy some cattle, and that Yellow Jacket [French] was coming in that afternoon with some cattle. "I found Yellow Jacket and Albert Meyers with the cattle. They told me Yellow Jacket owned them. I bought the cattle, but had some conversation with the defendant about them." (What conversation does not appear.) There were six head. On cross-examination, he said that Meyers "did not take any part in the trading at all. He was quite a way off, sitting on his horse. He said nothing about the sale. I did not pay him at any time any of the money for the cattle. I did not see him come with the cattle." Defendant French testified: "I was in Trinity County last January, and Albert Meyers helped me drive some cattle away from Trinity County at that time. There were about five head that did not belong to me, and one that did. * * * Albert Meyers and I drove them to Round Valley. We sold them. I think we got \$100 for the five head, and \$20 for mine. I never knew much about an understanding that Albert Meyers was to get one-fourth of the money. He did not say that he was to get one-fourth. I think that Bob Hoaglen (Hoagland) got the rest of the money. We were together all the time when we were driving the cattle from Trinity county to Round Valley. * * * I never noticed that this defendant got any of the money. Albert Meyers and me went out to Mad river to get Bob Hoaglen's (Hoagland's) cattle. We did get them and drove them in." On cross-examination he testified: "We went out to get Bob's cattle. He told us to go with him and drive his cattle. He said he had some cattle on his place, and wanted us to go out and get them and drive them to town for him. He told Meyers the same thing. Bob said they were his cattle. Meyers and I drove the

cattle to Covelo. When I drove them down to Covelo, I thought they were Bob Hoaglen's (Hoagland's) cattle. He told us they were his. * * * We drove them on a plain trail. * * * Bob Hoaglen (Hoagland) owns some cattle. I know his cattle, but not his mark or brand." Witness Vann testified that he was familiar with all the brands of cattle in that neighborhood, and with the owners of cattle, and that he never heard that Hoaglen (Hoagland) had any cattle there.

If the cattle were stolen, French was an accomplice of Meyers. Section 1111, Pen. Code, provides: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof." There is no evidence, aside from the testimony of the accomplice, (and his testimony is far from conclusive), showing defendant's guilt, or even sufficient to arouse a well-founded suspicion of his guilt. *People v. Main*, 114 Cal. 632, 46 Pac. 612, and it is needless to add that evidence sufficient to raise a suspicion of guilt could not alone be a corroboration under section 1111, nor would it justify a conviction. *Id.* If French's testimony is to be believed, both he and Meyers were told and believed the cattle belonged to Hoaglen (Hoagland) which would show absence of that union of act and intent required by section 20, Pen. Code, to be present in every crime.

It is advised that the judgment and order be reversed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed. MCFARLAND, J., HENSHAW, J., LORIGAN, J.

EMBEZZLEMENT.

Introduction to the subject by J. F. G.

The crime of Embezzlement, its scope, its history and the adjudications upon it in England, together with the converging statutes and conflicting decisions in America, presents a very interesting subject for study; and one which requires more space than the present volume permits. We gave some attention to the subject through editorial notes (by H. C. G.) in the eleventh volume of these reports, pp. 395-402, which should be read in connection with this review.

Distinction between common law larceny, and embezzlement by servants and clerks. Larceny, in its common law definition is, the felonious taking of the personal property of another with an intention to deprive the owner of the property therein. A trespass is an essential element of common law larceny; for without a trespass there would not be a taking against the will of the owner. A bailee having a legal possession or special ownership in the property of the bailor, entrusted to him, could not at common law be convicted of larceny, for the wrongful conversion of such property, unless he broke the bulk or package and thus, as it was illogically held, terminated the bailment; but it was held to be common law larceny for a servant to convert to his own use the property of, and received from, his master; for the legal possession remained in the master. The servant in such cases having only the bare custody, and not a legal possession; hence his conversion was a trespass against the master.

If, however, the servant, in the course of his employment received the property from a third person for his master, and converted it to his own use before the master obtained possession, either from his servant or by having it placed in his barn, store, or other place under his control, there would not be a trespass against the master, and hence, no common law larceny.

Because of this latter class of cases, arose the statutory crime of embezzlement;—*Embezzlement, therefore, unless otherwise provided by statute, is limited to cases, where a servant, clerk or agent, in the course of his employment, receives from third persons money, goods, or other personal property, for his master or employer, and converts it to his own use, before it comes into the possession of such master or employer.*

Larceny by servants and embezzlement under English Statutes:—

Mr. Roscoe in his opening chapter on Embezzlement, says: "The offense of embezzlement by clerks and servants was provided for by the statute 39 Geo. 3, c. 85; but that statute is now repealed, and the substance of it re-enacted by 7 & 8 Geo. 4, c. 29."

Mr. East in his Pleas of the Crown,* treats of it in his chapter on

* The preface to East's Pleas of the Crown bears the date of May 1803.

Larceny and Robbery; reciting several previous statutes, the inefficiency of which caused the noted statute of 39 Geo. 3, c. 85 to be enacted. In treating of this subject (2 East's Pleas of the Crown 560) he says:

"With respect to larcenies at common law committed by servants and others entrusted with the use or charge of goods, I shall have an opportunity of considering them more fully hereafter. For the present I have to observe that the legislature has thought it necessary to make special provision for them in several instances. And first, as to servants.

"The stat. 33 H. 6. c. 1. reciting, 'that divers household servants of Lords or other persons of good degree, shortly after their masters' deaths, violently and riotously have taken and spoiled the goods which were of their said masters at the time of their death, and the same distributed amongst them,' &c. enacts, 'that after full information made to the Chancellor by the executors (or any two of them) of such Lord or person, of such riot, taking, and spoil made &c. the said Chancellor, by the advice of the Chief Justices of B. R. and C. B., and the C. B. of the Exchequer, or two of them, may make out writs to such sheriffs as seem necessary, to make open proclamation (such as is thereby directed) for the said offenders to appear before B. R. on the day limited by the writ, &c.; whereupon if they make default, &c. they shall be attainted of felony: but if they appear, they shall be committed or bailed until they answer the said executors in such actions as shall be brought against them for the said riot, taking and spoiling,' &c. In effect, therefore, though if the party do not appear he shall answer for the offense as felony; yet if he appear, he may be sued as for a trespass. The statute extends to one executor, if but one.

"The stat. 21 H. 8. c. 7. reciting that divers persons had upon confidence and trust delivered unto their servants their caskets and other jewels, money, goods, and chattels, safely to keep to the use of the said masters, &c. and they had afterwards withdrawn themselves, and had gone away with the same or part thereof, or continuing with their master, &c. had converted the same or part thereof to their own use; and that it was doubtful whether this were felony or not at common law; enacts, 'that all and singular such servants (being of the age of 18 and not apprentices) to whom any such caskets, jewels, money, goods or chattels, by his or their said masters or mistresses shall from thenceforth so be delivered to keep, that if any such servant or servants withdraw him or them from their said masters or mistresses, and go away with the said caskets, &c., or any part thereof, with intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their said masters or mistresses; or else being in the service of his said master or mistress, without their assent or command, he embezzle the same caskets, &c. or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it; that if the said caskets, &c. that any such servant shall so go away with, or which he shall embezzle with purpose to steal it as is aforesaid, be of the value of 40s. or above; that then the same false, fraudulent,

and untrue act or demeanor from thenceforth shall be deemed and adjudged felony,' &c. and the offenders be punished for felonies committed by the course of the common law.

"By the stat. 27 H. 8. c. 17. clergy was taken away in this case: and it was made perpetual by stat. 28 H. 8. c. 2. and confirmed by stat. 1. Ed. 6. c. 12. f. 18. But both these acts were repealed by stat. 1. Mar. st. 1. c. f. 5. (a) The stat. 21 H. 8. however, was afterwards reenacted and revived by 5 Eliz. c. 10; but not the stat. 27 H. 8.; so that the party still had his clergy. But now by the stat. 12 Ann. c. 7. after-mentioned clergy is taken away if the offense be committed in a dwelling-house or outhouse thereunto belonging. It is said however that the offender is not transportable under the stat. 4 Geo. 1. c. 11. or 6 Geo. 1. c. 23. for that those statutes extend only to larcenies, and this is a breach of trust made felony by the statute. But I cannot subscribe to this opinion, at least to the full extent of it; for the stat. of H. 8. in effect only establishes what the common law had provided for, which by the recital it appears had been before doubted; and says that the offenses described shall be deemed felony, and the offenders punished as other felons by the course of the common law. But even if this were doubtful, the words of the stat. 4 Geo. 1. c. 11. are large enough to reach this case; for it extends to persons 'convicted of grand or petit larceny, or any felonious stealing or taking of money or goods, &c. from the person or house of any other, or in any other manner,' &c.

"This statute extends only to such as were servants to the owners of the goods both at the time of the delivery and when they were stolen, and not at all to apprentices bound by indenture as such, or to servants under 18 years of age. Therefore if A. deliver goods to B. to keep, and afterwards take him into his service, and then B. run away with the goods, it is no felony under this statute because not originally delivered under the special trust of a servant.

"But notwithstanding the exception as to apprentices, yet if any such take his master's goods delivered to him by way of charge, or not delivered to him at all, he is guilty of felony at common law.

"The statute is confined to such goods as are delivered to keep for the use of the master, to be returned to him again. And therefore a receiver who runs away with his master's rents received by him for his master, or a servant who being entrusted to sell goods or receive money due on a bond sells the goods, &c. and departs with the money, is not within the statute, because he did not receive the money by delivery from his master."

Later in the same chapter (page 564) Mr. East says: "The above statute however is but little resorted to at this day; for notwithstanding the inference which might at first sight be drawn from it, it is a clear maxim of the common law; that where one has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use. Thus a butler may commit larceny of plate in his

(a) Vide 1 Hale, 666, which supposes the repeal to have been by the stat. 1 Ed. 6. c. 12. instead of the stat. of Mary.

custody, or a shepherd of sheep. The same of a servant entrusted to sell goods in a shop. This rule appears to hold universally in the case of servants, whose possession of their master's goods by their delivery or permission is the possession of the master himself."

Continuing on the same subject, (page 565) he further says:

"I cannot do better than to refer to the several modern cases wherein the maxim of the common law touching larceny by servants has been fully recognized.

"A carter going away with his master's cart was holden felony.

"*Francis Paradise* was indicted for stealing a bill of exchange of 100 £ value, the property of William Periam. The prosecutor to whom the bill was indorsed was a draper at Devizes, and the prisoner, who was his book-keeper on a salary, kept his accounts, and received and paid money for him, but did not live in his house; but came every day there to transact his business. The prosecutor delivered the bill in question, with several others, to the prisoner, and ordered him to send them by that day's post, as he had often done before, from the Devizes to the prosecutor's banker in London, as cash to be accounted for to the prosecutor. The prisoner next day asked the prosecutor's leave to go to a town in the neighborhood, which was consented to on condition that he returned the next day by 12 o'clock. The prisoner went to Salisbury, got cash for the bill, which was endorsed by the prosecutor, and next by the prisoner; who was afterwards apprehended at Exeter with part of the bills and the money. Gould J., before whom he was tried and convicted, respited judgment to take the opinion of the judges whether this were felony or a breach of trust. In Easter term 1766 all the judges (except Lord Camden, who was absent,) held it larceny, upon the principle that the possession still continued in the master.

"*William Bass* was indicted for stealing gauze of above 80 £ value of John Gatsea. The prisoner was porter to the prosecutor, (in his general employ), who delivered to him a parcel containing the goods mentioned in the indictment to carry to a customer. In his way he was met by two men who prevailed upon him to go into a public house to drink with them; where they persuaded him to dispose of the goods, to which he consented. One of the men then brought a person who bought the goods, and the prisoner received eight guineas of the money. The question referred to the judge was, whether this amounted to a felonious taking? It was further mentioned as an additional circumstance, that the goods were taken out of the package in which they had been delivered to the prisoner, and put into a bag at the public house. In Michaelmas term 1782 all the judges held this to be felony, *because the possession still remained in the master*. That was the ground of the determination, not only as it appears from the MS. cited in the margin, but also as the case was afterwards cited by Mr. Justice Gould in giving judgment at the O. B. in Wilkins' case.

"*John Lavender* was indicted for larceny at common law of a certain sum of money belonging to John Edmonds. The prisoner was a servant to Edmonds, who had delivered him the money in question to carry to the house of one Thomas Flawn, and there to leave the same with

him, he having agreed to give Edmonds bills for the money in a few days. The prisoner did not carry the money to Flawn as directed, but went away with it, purchased a watch and other things with part, and part remained in his possession when he was apprehended. Being found guilty, sentence was respited for the opinion of the judges, whether this were a felony or a breach of trust; and in Easter term 1793 all the judges held this was a felony, and that the last point in *Watson's case* above referred to was not law. In Trinity term following this case was again under the consideration of the Judges; when they adhered to their former opinion: and some said that the distinction between this case and *Watson's*, if there were any, was, that in *Watson's case* the money was not delivered to the prisoner to be paid specifically to any other person; but if the prisoner had laid out his own money to the same amount in buying licenses, it would have been a compliance with the order. He was commissioned to merchandize with the money. But they admitted that the distinction, if any, was extremely nice; and Buller J. thought there was none: and recognized the case of *R. v. Paradise* before Gould J. as good law.

"Upon an indictment for larceny of a bill of exchange for 122 £ the property of R. Burkit and T. Fothergill, it appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns. He received the bills and money remitted and due to his masters, carried bills to their bankers to discount when ever he wanted cash, made payments for freight and other similar matters, and settled the balance with his masters every week. On the 14th of Sept. 1795 the bill in question, due the 17th, was remitted to the prosecutors by the post: and Mr. Burgit gave it to another clerk to get it accepted, which he did, and then laid it among other bills on his master's desk. On the 16th September the prisoner carried this and another bill to the bankers, and it being observed there that neither of them were indorsed by the prosecutors, it was asked whether they were to be entered short, or discounted? The prisoner said he wanted small notes and money for them, and that the money must be full weight and good, as it was for Mr. Burkit's particular use. On the same day he absconded with the money he had thus received, and was taken under a feigned name from on board a ship at Falmouth. It was contended that this was only a breach of trust, the bill having come legally into his possession; not delivered for any specific purpose, but generally like all the other bills of his masters over which he had a disposing power; that he had a right to receive the money for the bill, though not to convert it when received to his own use; and therefore could not be guilty of stealing the bill itself; and it was likened to *Waite's case* after mentioned. But Heath J. was clearly of the opinion that this was felony; and the prisoner was convicted and sentenced to transportation.

"All that has been said above relating to servants is upon a supposition that the goods purloined were received into the master's possession before the actual taking by the servant: for if the master had no otherwise the possession of them by the bare receipt of his servant upon the delivery of another for the master's use, and the servant have done no act to

determine his original, lawful and exclusive possession, as by depositing the goods in his master's house or the like; although to many purposes and as against third persons this is in law a receipt of the goods by the master, yet it has been ruled otherwise in respect of the servant himself upon a charge of larceny at common law in converting such goods to his own use: because as to him there was no tortious taking in the first instance, and consequently no trespass, as there is where a servant converts to his own use property in the virtual possession of his master, whereof he has but the bare charge for special purposes committed to him by such master."

Conversion to their own use, of property received in the course of their employment, by servants or clerks, not larceny—Cases which led to the enactment of 39 Geo. 3. c. 85.—Waite's Case—Bull's Case—Bazeley's Case—Copy of the statute.—One of the leading cases on this subject is *Bull's Case*, of which there seems to be no official report; but the statement made by counsel for the defendant in *Bazeley's Case*, as given by Mr. Leach, is accepted as correct. Mr. East gives a brief review of it in his report of *Bazeley's Case*. Both Mr. Leach and Mr. East give prominence to *Bazeley's Case*; but as Mr. Leach devotes much space to arguments of counsel, and but little to the opinions of the judges, we accept for the present the account given by Mr. East.

We will now give his version of these cases, and a copy of the statute 39 Geo. 3. c. 85. (The foot notes are as they appear in his work.)

After treating of larceny by servants who obtained possession of the goods from their masters, (2 East's Pleas of the Crown 570) Mr. East says:

"It is different where the master has no otherwise any property or possession in the thing stolen than by the delivery to the servant for the master's use.

"*John Waite* was indicted for feloniously stealing six East-India bonds laid in one count to be the property of the Bank of England, and in another to be the property of a person unknown, and laid to be against the person of the statute. It appeared that the bonds in question among several others were paid into the Bank by the order of the Court of Chancery in several causes, according to the directions of the statute 12 Geo. 1. c. 32. which makes the Bank accountable for what is so paid in; and that Waite was one of the cashiers and was employed in transacting this business, and had given security to the Bank for his integrity; and that he had given receipt for these bonds for the governor and company of the Bank of England. That it was the practice of the Bank, when any securities from the Court of Chancery were deposited there for the directors to lock them up in a chest in the cellar; but that the bonds in question were never locked up in the chest: but Waite, when he received them from the Court of Chancery, put them into his own desk, and afterwards sold them, and put the money into his own pocket.

"For the prisoner, it was argued, that this was only a breach of trust, and was not felony. For the stat. 21 H. 8. c. 7. which made it a felony in servants to take or embezzle their masters' money, does not extend to it. That the stat. 15 Geo. 2. c. 13 had now made this felony;

but that act having been made since the transaction in question happened, shewed that it was not felony before. The Judges Carter and Dennison (a) were clearly of the opinion that this case was not felony; for the bonds were received by Waite, and were never put into the cellar as is usual: so that the possession was always in him, and the Bank had no possession but what was the possession of Waite, till they were brought down and placed in the chest in the cellar as usual. Dennison J. said, that though this might be a possession in the Bank whereon they might maintain a civil action, yet there was a great difference between such a possession and a possession whereon to found a criminal prosecution. The prisoner was acquitted.

"*Joseph Bazeley* was tried at the O. B. in February 1799, on an indictment for stealing a bank note of the value of 100 £ the property of Peter Esdaile and others, bankers in London. It appeared in evidence, that Mr. Gilbert, who kept cash with these gentlemen, sent by his servant 122 £ in bank notes and 15 £ in money and amongst the bank notes was the note in question. That the servant delivered the whole into the hands of the prisoner, who was a clerk to the bankers, *and as such authorized to receive and give a discharge for the same*, and that it was his duty to put the money received into a till, and to place in another drawer the several bank notes which he might receive during the day, for the purpose of another clerk taking down and entering in a book the particular description of each note. The prisoner gave an acknowledgment to the servant of having received the full sum of 137 £, and put the money into the till; but instead of placing the remaining sum of 122 £ which he received in bank notes into the drawer according to his duty, he kept back the one of 100 £, for which he was indicted; and only delivered over those to the amount of 22 £. The jury found the prisoner guilty, subject to the opinion of the judges. Whether such taking were to be considered as felonious, or only a breach of trust? The case was argued in the Exchequer-chamber in Easter term 39 Geo. 3, before all the judges, except Ashhurst, Buller, and Heath Js. who were absent. The arguments are in print, and therefore I shall not detail them at length in this place. It is sufficient to observe, that on the part of the prisoner it was contended to be a breach of trust, and not felony. And these distinctions were taken; that larceny is the taking of property from the possession of another without his consent and against his will: breach of trust the misapplication of property which another by his own voluntary consent has put into the possession of the party: and that fraud was (in this respect) the obtaining the possession of the property of another with his consent by some contrivance against which common prudence cannot guard. That in order to constitute larceny the owner of the property must be in possession of it either actually or constructively.

That there was no actual possession, nor any constructive possession as against the prisoner. In the course of the argument it was stated

(a) Mr. Leach's report of this case says it was tried before Reynolds B.

and admitted that the prisoner had given his employers security to account for what he received, and against embezzlements. And on the part of the prisoner this was likened to a *case of one Bull* (a) who was indicted for receiving his master's money. The prosecutor was a pastry-cook, and having occasion to suspect that he was being robbed by the prisoner, who was his servant attending his shop, he employed a customer to come to his shop, on pretense of buying something; and for this purpose he gave him some marked shillings of his own, with which the customer came to the shop in the absence of the owner, and bought goods of the defendant. Soon after the master coming in examined the till where the defendant ought to have deposited the money when received, and not finding all the marked money there, he procured the defendant to be immediately apprehended and searched, and the rest of the marked money was found upon him. After conviction the point was saved by Mr Justice Heath; and the judges on being consulted were of opinion that the prisoner was not guilty of larceny, but only of a breach of trust; the money never having been put in the till, and therefore not having been in possession of the master as against the defendant. And *Waite's case* before mentioned was very mainly relied on, in order to shew that this was a mere breach of trust; confirmed as the doctrine there laid down had been by the acts of the legislature in providing in future against embezzlements of that sort in the particular case of the Bank, by the act of the 15 Geo. 2. c. 13. and by similar statutes in regard to the Post-office and other cases. And the particular contract between the prisoner and his employers was also insisted upon, as distinguishing this from the general case of master and servant.

"During the argument Eyre C. J. observed, that *Charlewood's case* and other cases of the sort turned upon the possession having been unlawfully obtained by the prisoner; but that here there was no evidence to find such an original intention to steal, because the possession came to the servant in the ordinary course of his business, without any act of his own for that purpose.

"For the crown, it was insisted upon as a general rule, that in the case of personal chattels the possession in law follows the right of property. That if by law the possession of the servant were that of the master, which could not be denied, then no compact between them to indemnify the master could do away with the operation of the law. That the customer did not mean to deposit the notes as a matter of trust in the clerk's hands; for they were paid in the banker's own house, of which the defendant was only one of the organs; and therefore it was like paying money into the hands of the bankers themselves; and the act of receipt by the clerk *co instantur* vested the possession in them.

(a) Thomas Bull's case, O. B. Jan. Sess. 1797, cor. Heath J. and afterwards before the judges in Hilary term following. No regular case in writing was laid before the judges; but the circumstances were as stated here; and the prisoner, who appears by the O. B. Sessions' Papers to have received sentence of transportation, was afterwards recommended for a pardon. Vide 2 Leach, 980. S. C.

That in *Bull's case* the servant had authority to sell the goods, and was only accountable for their value; but the prisoner had no authority to dispose of the notes which he received in the shop. But there could be no doubt in that case, if the servant had embezzled the master's goods out of his shop it would have been felony. That considering this as a bailment, yet part of the property being deposited in its proper place, the separating the other part made it a felony, for the bailment was entire. That in *Waite's case* there was a personal confidence reposed in him by the person making the deposit in the known authenticated character of *cashier of the Bank*. The act of parliament directing the deposit to be with the *cashier of the Bank*; and therefore a delivery to him at any place would have been sufficient.

"Lord Kenyon C. J. thereupon observed, that the provisions of that act would hardly warrant an inference that the deposit was directed to be made personally with the cashier; but merely with him as an officer of the corporation, who must act by their agents. And Lord C. J. Eyre remarked, that the money and bonds were to be paid *to the Bank*, though the *cashier's receipt* was to be a discharge so as to bind the Bank.

"It was then said that the act was made *pro majori cautela*.

"Afterwards on consultation among the judges, some doubt was at first entertained; but at last all assembled agreed that it was not felony, inasmuch as the note was never in the possession of the bankers distinct from the possession of the defendant; though it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it. And they thought that this was not to be differed from the cases of *Waite* and *Bull*, which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner: and here it was delivered into the possession of the prisoner. That though to many purposes the note was in the possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached, for it was a lawful one. Eyre C. J. also observed, that the cases ran into one another very much, and were hardly to be distinguished. That in the case of the *King v. Spears* the corn was in the possession of the master under the care of the servant. And Lord Kenyon said he relied much on the act of parliament respecting the Bank not going farther than to protect the Bank. The prisoner was accordingly recommended for a pardon.

"This decision, however just in leaning to the merciful side on a doubtful question of law, having opened a door to the most alarming and extensive frauds by servants in general, and particularly in those instances where from the very nature of their employment they were unavoidably entrusted with the receipt of large sums of money in commercial transactions, the legislature thought it necessary to interfere immediately, and accordingly the declaratory act of the 39 Geo. 3. c. 85. was passed, intitled 'An act to protect masters against embezzlements by their clerks or servants;' which reciting that 'whereas bankers, merchants, and others, are, in the course of their dealings and transactions, frequently obliged to entrust their servants, clerks, and persons employed by them in the like capacity, with receiving, paying, negotiating, exchanging or

transferring money, goods, bonds, bills, notes, bankers' drafts, and other valuable effects and securities: and whereas doubts have been entertained whether the embezzling of the same by such servants, clerks, and others, so employed by their masters, amounts to felony by the law of England; and it is expedient that such offenses should be punished in the same manner in both parts of the United Kingdom;' enacts and declares, 'that if any servant or clerk or any person employed for the purpose in the capacity of a servant or clerk, to any person or persons whomsoever, or to any body corporate or politick, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security, or effects, for or in the name or on the account of his master or masters, or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof; every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use or in whose name or names, or on whose account the same was or were delivered to or taken into the possession of such servant, clerk, or other person so employed; although such money, goods, bond, bill, note, banker's draft, or other valuable security, was or were no otherwise received into the possession (a) of his or their servant, clerk, or other person so employed. And every such offender, his adviser, procurer, aider, or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported to such parts beyond the seas as his majesty, by and with the advice of his privy council, shall appoint for any term not exceeding fourteen years, in the discretion of the court before whom such offender shall be convicted or adjudged."

"(a) By some blunder, in the fair copy taken from the original draft of the act, a line has been here omitted which was in the original draft prepared by myself. The words omitted are those which follow in italics; 'although such money, &c. was or were no otherwise received into the possession of such master or masters, employer or employers, than by the actual possession of his or their servant,' &c. the insertion of which will make the language of the legislature, as to the particular occasion of passing the act, more intelligible than it is at present."

Copy of Statute, 7 & 8 George 4, Chapter 29, Sections 47 and 48 as given by Mr. Russell—Views of Mr. Russell as to the statute: Mr. Russell, who was a later writer than Mr. East, commences his chapter on embezzlement with a review of the statute 7 & 8 George 4 chapter 29; and on pages 167 and 168 of 2 Russell on Crimes he says:—

"The 7 & 8: Geo. 4. c. 29, s. 47, 'for the punishment of embezzlements committed by clerks and servants,' declares and enacts, 'that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money or security, was not received into the possession of such master otherwise than by the actual possession of his clerk, servant or other person so employed;

and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore mentioned.'

"The 48th section 'for preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders,' enacts, 'that it shall be lawful to charge in the indictment, and proceed against the offenders for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and in every such indictment, except where the offense shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof shall be returned to the party delivering the same, or such part shall have been returned accordingly.'

"These provisions are substituted for the repealed statute 39 Geo. 3, c. 85, and those contained in the 48th section are intended to remove the very considerable difficulties which so often prevented a prosecution under the repealed statute from being effectual. The full case, upon which the master had arrived at the conclusion of his servant's guilt, and determined to prosecute, could hardly ever be laid before the jury, on account of the rule, which forbids evidence of two and distinct and independent felonies upon one indictment; it repeatedly occurred that the person from whom the prisoner had received the money could not specify the mode of payment; and it happened not infrequently that the prisoner had received a piece of coin or a note of a larger amount than the sum which was to be paid on account of his master, and had given change. In the former of these cases the jury often acquitted, from an impression that the prisoner had acted by mistake, and unintentional error, an impression which would have been removed, if the facts on which the master had proceeded had been fully laid before them; and in the two latter cases the prosecution necessarily failed, as being unsupported by evidence. It is conceived that the better remedy for these defects would have been applied by making the offense a misdemeanor, as the anomalous averments and evidence introduced by the 48th section, upon a prosecution for *felony* would have been avoided.

"This enactment of the 7 & 8 Geo. 4. c. 29, s. 47, like the repealed statute of the 39 Geo. 3, has the same effect it should seem of constituting the offense described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offense a larceny, and under what circumstances the offender shall be deemed to have *feloniously stolen*. First, he must be a clerk or servant: then he must by virtue of his employment receive or take into his possession some chattel, money, &c.;

and that must be for and in the name or on the account of his master; and he must fraudulently embezzle the same. But probably this like the 39 Geo. 3, would not apply to cases which amount to larceny at common law."

English adjudications on the above statutes—Their bearing on American Statutes.

It is a familiar rule of statutory construction, that when a legislature in one jurisdiction in enacting a law, follows the language or substance of a well known statute existing in another jurisdiction, it is presumed that it followed the previous statute in the light of the adjudications upon it; hence, as many of the American statutes are quite similar both in substance and form to the English statutes on embezzlement, early English cases form an interesting study in the construction and application of the American statutes, and accordingly we present to the attention of the reader the following of them:—

REX V. WILLIAM MELLISH.

Russell & Ryan 80.

39 G. 3, c. 85. Embezzlements by servants, &c. This statute extends only to such servants as are employed to receive money, and to instances in which they receive money by virtue of their employment. It seems that an apprentice, though under the age of 18, is within the statute.

Crown Case Reserved—Easter Term 1805.

The prisoner was tried before the Recorder at the Old Bailey February sessions, in the year 1805, upon an indictment, the first count of which charged, that he, on the 12th January, 1805, at &c., was servant to one Samuel Newman, a butcher, and being such servant, did receive and take into his possession the sum of seventeen shillings and ten-pence for and on account of his master the said Samuel Newman; and that having so received the said sum of money for and on account of his said master, he fraudulently and feloniously did embezzle and secrete the same; and so the jurors did say, that he in manner aforesaid feloniously did steal, &c. from the said Samuel Newman, his said master and employer, the said sum of seventeen shillings and ten-pence, for whose use and on whose account the same was delivered to and taken into the possession of him the said William Mellish, being so employed as aforesaid, against the statute, &c. The second count was the same as the first, only charging him to have received the money of one Thomas Hutchinson.

It appeared that the prisoner, who was under eighteen years of age, was an apprentice to Samuel Newman, a butcher at Brentford, and that it was the prisoner's duty to go daily for orders to a Mr. Hutchinson's, who dealt with Newman for meat. But it was not proved that the prisoner had ever been employed by his master to receive money. Upon the 12th of January, the prisoner brought Hutchinson a bill for meat, amounting to eleven shillings and ten-pence, which bill was in the handwriting of Newman's niece, who kept his accounts and made out his bills. Hutchinson desired the prisoner to take back the bill to get a receipt to it, and to include in the bill some meat which he then ordered.

The prisoner came back with the meat and a receipt to the bill, and received the amount, seventeen shillings and ten-pence; the last item of meat, six shillings, was not in the handwriting of Newman's niece, nor were the words "paid Newman." The prisoner embezzled the money.

The jury having found the prisoner guilty, the recorder reserved the following point for the opinion of the judges, namely, whether the prisoner, *being an apprentice to the prosecutor*, came within the meaning of the 39 G. 3, c. 85. (a)

At a meeting of all the judges in Easter term, 11th May, 1805, they were all of opinion that the conviction was wrong; on the ground that it did not appear by the evidence that the prisoner *was ever employed to receive money for his master*, or received the money in question by virtue of his employment. Upon the other objection, it seemed to be the opinion of the judges that an apprentice was within the meaning of the act.

(a) 21 H. 8 c. 7, makes it a felony in servants embezzling their master's goods, except apprentices and servants under eighteen years of age. But the 39 G. 3, c. 85, contains no such exception.

REX V. JOHN BURTON.

1 Moody's Crown Cases 237.

In an indictment under 7 & 8 G. 4. c. 29, s. 47, the person employed to collect the sacrament money from the communicants is not the servant of the minister, churchwardens, or poor.

Crown Case Reserved.—Michaelmas Term 1829.

The prisoner was tried and convicted of embezzlement before Lord Tenterden, at the summer assizes for Derbyshire, 1829, on the following indictment:

That John Burton, late of the township of Chaddesden, in the county of Derby, labourer, on the 21st June in the 10th year, &c. at, &c., was a person employed and entrusted in the capacity of a servant by Richard Coke Wilmot, to receive money for and on account of the said R. C. W., and being such person so employed and entrusted in the capacity of servant as aforesaid, did then and there by virtue of such employment receive and take into his possession certain money, to wit, the sum of 5s., for and on the account of the said R. C. W., and afterwards, to wit, on the same, &c., with force and arms, at, &c., fraudulently and feloniously did embezzle and secrete the said money, and so the jurors aforesaid, upon their oath aforesaid, and do say that the said J. Burton, in manner and form aforesaid, feloniously did steal, take, and carry away from the said R. C. W. the said sum of 5s. of the moneys of the said R. C. W., for whose use and whose account the same was delivered to and taken into the possession of the said J. Burton, being such person so employed and entrusted in the capacity of a servant as aforesaid, against the form of the statute, &c., and against the peace.

Second count. In the name aforesaid R. C. Wilmot. Third and fourth. W. Morley and Samuel Goodwin instead of R. C. Wilmot. Fifth and sixth. R. C. W., and said Morley and Goodwin. Seventh and eighth. Of the poor of the township of Chaddesden.

R. C. Wilmot, who is named in the first and second counts, was curate of the perpetual curacy of the township of Chaddesden (since made a parish), and Morton and Goodwin were the churchwardens.

The prisoner was the clerk of the chapelry. On the day mentioned in the indictment, being sacrament Sunday, he went to the pews of the several communicants with a plate to collect the alms, and then took the plate to the altar, and delivered it to Mr. Wilmot, who then put in his donation. This was according to practice. It was very clearly proved, that the prisoner purloined two half-crown pieces from the plate, and secreted them in his pocket for his own use.

It was objected, that he was not the servant, nor employed in the capacity of a servant, of any or either of the persons named in the indictment; and also that the money received as alms, was not the money of them, or any, or either of them.

Reference was made to that part of the rubrick which directs that the deacons, churchwardens, or other fit persons appointed for the purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin, to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table: and also, to the last paragraph of the rubrick, which directs that the money shall be disposed of to such pious and charitable uses as the minister and churchwardens shall see fit, wherein, if they disagree it shall be disposed of as the ordinary shall direct.

There had been no disagreement on this subject at Chaddesden.

The learned Lord Chief Justice had conversed with the L. C. Baron, who was on the same circuit, on this indictment, before the trial; and they both doubted whether the case was within the stat. 7 & 8 G. 4, c. 29, s. 47, and his lordship respited the judgment, in order that the opinion of the learned judges might be taken.

At a meeting of the judges, in Michaelmas term, 1829, this case was discussed; and the judges thought that the prisoner was not the servant of any of the persons alleged in the indictment, and a pardon was recommended.

REX V. JOHN THORLEY.

1 Moody's Crown Cases 343.

Embezzlement of money by a servant not authorized to receive it is not within 7 & 8 G. 4, c. 29, s. 47.

Crown Case Reserved—Easter Term 1832.

The prisoner was tried before Mr. Justice J. Parke, at the Spring assizes for the county of Warwick, in the year 1832, on an indictment which charged him, as the servant of Humphrey Brown and others, with

the embezzlement of 8 l. 4 s. 10 d., received by him by virtue of his employment.

The prisoner was a servant of H. Brown and Sons, carriers, who had a warehouse at Birmingham: his employment was to look up goods to be carried by his master's wagons; but he had no authority to receive money, all moneys were collected and received by a collecting clerk.

Mr. Price, a debtor to Brown and Sons, went into the counting-house, part of their warehouse at Birmingham, and, seeing the prisoner there standing at the desk, with some books near him, and supposing him to be a clerk authorized to receive moneys, paid him 8l. 4s. 10d.; for which the prisoner gave a receipt in his own name for Brown and Sons.

This sum the prisoner fraudulently applied to his own use.

By the 7 & 8 G. 4, it is provided, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any money for or in the name of his master, and shall fraudulently embezzle the same, every such offender shall be deemed to have feloniously stolen the same from his master, although such money was not received into the possession of such master, otherwise than by the actual possession of his clerk, servant, or other person so employed.

This clause does not differ materially from the statute 39 G 3, c. 85, on which *Rex v. Mellish*, Russ & Ry. 80, was decided. The learned judge would have directed an acquittal had not a similar case been cited from an old edition of Archbold's Criminal Law, as decided by Holroyd, J., at York, in which the contrary is stated to have been ruled; and, upon conferring with Mr. Baron Bayley, he thought there was sufficient doubt to make it fit that the case should be considered by the judges. *Rex v. Beechey*, R. & R. 319.

In Easter Term, 1832, all the judges (except Lord Lyndhurst and Taunton, J.) met, and having considered this case, were unanimously of opinion that, as the servant had no authority to receive the money, the case was not within the statute; and the conviction was therefore wrong.

(a)

(a) *Rex v. Hughes*, *infra*, 370.

REX v. WILLIAMS.

6 Carrington and Payne, 626.

If a servant be indicted under the stat. 7 & 8 Geo. 4, c. 29, for embezzlement, and the indictment contain only one count, charging the receipt of a gross sum on a particular day, if it turn out that the money was received in different sums, on different days, the prosecutor must make his election, and confine himself to one sum and one day; and if the money was paid to the prisoner as servant of the prosecutor, it will be sufficient, although the payment was made by one of a class of customers of whom the prosecutor did not authorize the prisoner to receive money.

Old Bailey October Session, 1834.

The indictment, which consisted of only one count, charged the prisoner

with receiving on a certain day the sum of eleven shillings and ten-pence on account of his master, and embezzling and stealing the same, against the statute.

From the evidence it appeared that the prisoner had received money in different sums upon different days, amounting in the whole to the sum mentioned in the indictment, and the prosecutor stated, that he never employed or authorized the prisoner to receive money from any persons who were regular customers, and that the persons from whom he received the sums in question were of that description.

Mr. Serjt. ARABIN.—Two points have suggested themselves to my mind: one, as to whether the prosecutor ought not to select one sum received on one particular day, and confine his evidence to that; and the other, as to whether the prisoner can, under the circumstances, be considered as having received the money as the servant of the prosecutor.

My opinion is, that the evidence should be confined to one transaction, and that the receipt as a servant, is sufficiently made out. But as the judges are sitting in the adjoining court, I think it advisable to confer with them on the subject.

The learned Serjeant afterwards stated that he had conferred with the judges, (*Gaselee, J., Alderson, B. and Gurney, B.*) and that they were of opinion that the prosecutor must be confined to one sum and one day; and that, as the customer made the payment to the prisoner as the servant of the prosecutor, it was sufficient, to sustain the allegation that the money was received by the prisoner for and on account of his master.

Verdict—Guilty. Sentence, three months' imprisonment.

REX V. JOHN MURRAY.

1 Moody's Crown Cases 276.

If the property embezzled by a clerk, &c. has been in the possession of the master or of any of his other servants, the case is not within the statute 7 & 8 G. 4, c. 29, s. 47.

Crown Case Reserved—Trinity Term 1830.

The prisoner was tried before T. Denman, Esq. Common Serjeant, at the Old Bailey Sessions in June, 1830.

The indictment stated that the prisoner, being a clerk in the employ of A., did, by virtue of such employment, receive and take into his possession the sum of 3 l. for and on account of his said master, and did afterwards fraudulently and feloniously embezzle 10 s. part of the sum above mentioned; and so the jurors say that the prisoner did feloniously steal, take, and carry away from the said A. the said sum of 10 s. of the moneys of the said A. The prisoner was proved to be a clerk in the employ of A.: He received from another clerk 3 l. of A.'s money that he might pay (among other things) for inserting an advertisement in the Gazette: the prisoner paid 10 s. for the insertion, and charged A. 20 s. for the same, fraudulently keeping back the difference, which he converted to his own use.

The prisoner's counsel contended that this evidence did not support the indictment, 3 Russ. 1233, 1st edition.

The learned Common Serjeant directed the jury to find the prisoner guilty, if they thought the evidence proved the facts above set forth, which they did; and he therefore now respectfully requested the opinion of the learned judges, whether the facts sustain the indictment.

At a meeting of the judges after Trinity term 1830, at which all the learned judges were present, this case was considered, and they thought the case not within the statute, because A. had had possession of the money by the hands of his other clerk, and that the conviction was therefore wrong.

(Sub-note by J. F. G.)—A later valuable case on this subject is, *Queen v. Hawkins* 1 Denison 584, argued as a Crown Case Reserved, on June 1, 1850, before WILDE, C. J., ALDERSON, B., PATTESON, J., COLERIDGE, J., and PLATT, B. It was in substance as follows:

The defendant was a clerk of an army tailor at Portsmouth. It was his duty to go on board of ships, take orders and sell clothes on account of his master. He took passage on the *Terrible* at Portsmouth to Plymouth being entrusted with a quantity of soldier clothes, and 10 £ in silver for change. At Plymouth he wrote for more clothes, stating that he could do business with the mariners on the *Gladiator*; and, he received the goods. He then entered the *Gladiator* as a seaman and sailed for Africa. Previously, he wrote that he would get his accounts made up and remit the money from Madeira, through Mr. Steele, the lieutenant of the marines; but it appears that he did not mention the matter to Mr. Steele. The *Gladiator*, by stress of weather, was driven back to Plymouth, where the defendant was arrested. Most of the goods were found with him, and, no proof was made of any sales. The indictment was as follows: 1st Count,—Embezzlement of twenty handkerchiefs and one pair of trowsers; 2nd Count,—Embezzlement of 10 £ in money; 3rd Count,—Larceny of both the goods and the money. In his charge to the jury Recorder Symons directed an acquittal on the 2nd count, in that there was no evidence of a receipt of the money, and no demand made for, or refusal to, account; but left it with the jury to say whether there was an embezzlement of the goods; but no reference was made in the charge as to the count for simple larceny. The jury found the defendant guilty under the 1st count.

In announcing the opinion WILDE C. J. said:

"It seems to me that the decisions are all one way, and all adverse to the conviction. Here the goods were received by the prisoner direct from the master, therefore, there was no embezzlement. The dictum in *R. v. Whittingham* 2 Leach 912, must be associated with some facts which do not appear in the report of the case. The conviction is wrong for embezzlement; but might have been good for a larceny." The rest of the court concurred.

REGINA V. JOHN NORMAN.

Carrington & Marshman 501.

July 26, 1842.

Embezzlement necessarily involves secrecy and concealment. If, therefore, instead of denying the appropriation of property, the prisoner, in rendering his account, admits the appropriation, alleging a right in himself, no matter how unfounded, or setting up an excuse, no matter how frivolous, his offence in taking and keeping, is no embezzlement.

EMBEZZLEMENT.—The prosecutors were owners of a vessel, and the prisoner was in their service as her master. The vessel was chartered to carry culm from Swansea to Plymouth, for a coal merchant resident at the latter place. The culm when delivered at Plymouth weighed 215 tons and the prisoner received payment from the coal merchant for the weight accordingly. When he was asked for his account by an owner, he delivered a statement, acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being further asked whether this was all he had received, he answered, that there was a difference of five tons between the weighing at Swansea and the weighing at Plymouth, and that he had retained the balance for his own use, according to a recognized custom between owners and captains in the course of business.

There was no evidence of the alleged difference of measurement in weighing, or of the custom asserted by the prisoner.

Cresswell, J., (in summing up).—I think that this does not amount to embezzlement. Embezzlement necessarily involves secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owns it, alleging a right, or an excuse for retaining the sum detained, no matter how frivolous the allegation, and although the fact itself on which the allegation rests were a mere falsification; as if, in the present case, although it should turn out that there was no such difference as that asserted by the captain, between the tonnage as measured at Swansea and at Plymouth, or that there was no such custom as is set up. I do not say to what species of offence this may amount, but in my opinion not to embezzlement.

Verdict—Not Guilty.

Merivale, for the prosecution.*Rowe*, for the prisoner.See the case of *Rex v. Hodgson*, 3 C. & P. 422.

REGINA V. WILLIAM CREED.

Carrington & Kirwin 63.

February 25, 1843.

If a person, whose duty it is to receive money for his employer, receive money and render a true account of all the money he has received, he is

not guilty of embezzlement, if he absconds and does not pay over the money; but if he had received the money and had rendered an account in which it was omitted, this would be evidence to shew that he had embezzled the amount.

The collector of a water company, as was his practice, gave the prisoner, who was the turncock, three receipts for water rents, desiring him to receive the amounts. On a subsequent day the collector asked the prisoner if he had received the amounts, when he said, that he had, and would pay them over on the following Monday; instead of which, he absconded:—Held, no embezzlement.

EMBEZZLEMENT.—The first count of the indictment charged, that the prisoner, being a servant of "The Reading Waterworks Company," had embezzled the sum of 8 s. The second and third count charged the prisoner with having embezzled the sums of 10 s. and 7 s. The fourth count charged the prisoner with having embezzled a half-sovereign; and the fifth count was for a larceny.

It was opened by *Beadon*, for the prosecution, that "The Reading Waterworks Company" was a corporation established by an act of Parliament, and that the practice was for Mr. West, the company's collector, to collect the waters rents in advance; but that where parties did not pay him after two or three calls, the receipts for their water rents were given by Mr. West to the prisoner, who was the turncock of the company; and if the payments of the rent were not made to him, the supply of water was cut off. In the month of February, 1843, receipts for the several sums mentioned in the indictment were given by Mr. West to the prisoner, for him to receive the sums due from the parties named in them for water rent; and on Saturday, the 12th of February, Mr. West asked the prisoner if he had received these sums, when the prisoner replied that he had received them, and would pay them over to him on the following Monday; The prisoner, however, did not do so, either of that day or the next, and on the Wednesday Mr. West went to the house of the prisoner and found that he had absconded.

Erskine, J.—If the prisoner rendered a true account of the money he had received, it is no embezzlement; if he had received these sums, and had rendered an account in which the sums were omitted, it would be evidence to shew that he had embezzled the amount.

His lordship directed an acquittal.

Verdict—Not Guilty.

Beadon, for the prosecution.

Carrington, for the prisoner.

(Attorneys—Vines & Hobbs, and Slocombe.)

REX v. ELIZABETH SMITH.

Russell & Ryan 267.

A female servant is within the 39 G. 3. c. 85. If a servant receives money from his master to pay to J. C., and does not pay it, Qu. if he can be indicted for embezzlement.

(NOTE—The above is the syllabus as it appears in Russell & Ryan;

but, from the report of the decision it appears, that the Judges held positively, that proof of non-payment, is not of itself, proof of embezzlement?—J. F. G.)

Crown Case Reserved Hilary Term 1814.

The prisoner was tried before Macdonald C. B., at the summer assizes for the county of Norfolk, in the year 1814, on an indictment for embezzling a 5 £ note, the property of Charles Pincing.

It was proved that the prisoner was house-keeper to Pincing; and that, on the 20th of July, 1813, Pincing delivered to her two 5 £ notes, and other money, part of which was to be paid to the collector of the property tax, and the sum of 5 £ 8 s. was to be paid to the overseer of the poor, one John Thurkill. It was proved that Thurkill never received the 5 £ 8 s., or any other sum from the prisoner.

The prisoner was accordingly convicted of embezzlement, but the learned judge doubted whether the act of the 39 G. 3, c. 85, could apply to a *female servant*, inasmuch as that statute enacts, and declares, "That if any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk, to any person or persons whomsoever, &c. shall, by virtue of such employment, receive or take into *his* possession any money, &c. such servant fraudulently embezzling the same shall be deemed to have stolen it feloniously.

From the whole context of this section, and especially from the words *into his possession*, the learned judge was inclined to think that a female servant was not within the act, and he forebore to pass sentence, and reserved the point for the consideration of the judges.

In Hilary term, 29th of January, 1814, all the judges met (except Mansfield C. J.), and were of opinion that the conviction was wrong, on the ground that there was not sufficient evidence of the prisoner's having embezzled the money; the fact of not having paid the money over to the collector, not being evidence of actual embezzlement, it only negatives the application of the money in the manner directed.

All the judges agreed that a *female* was within the act.

(SUB-NOTE by J. F. G.—From the above report, it would seem that the question, as to whether the crime, if any, was embezzlement or larceny was not presented or considered; for had it been, the judges would doubtless have held as they did in 1809 in *Rex v. Hcadge*—R. & R. 160—that the Statute, 39 G. 3, c. 85 did not apply to any case which would be larceny at common law. Where the servant receives the money or goods from the master, the servant has a bare charge, the legal possession remaining in the master. In such case the crime, if any, is larceny and not embezzlement. See *Rex v. Murray*, ante., 324; and general review of the subject in these notes.)

REX V. WILLIAM HEADGE.

Russell & Ryan, 160.

EMBEZZLEMENT. *Although property has been in the possession of the prisoner's masters, and they only entrust the custody of such property to*

a third person to try the honesty of their servant. If the servant receives it from such third person and embezzles it, it is an offence under the statute. Semble, that the 39 G. 3 c. 85. does not apply to cases which were larceny at common law. S. C. 2 Leach, C. C. 1033.

Crown Case Reserved—Michaelmas Term 1809.

The prisoner was tried and convicted before Mr. Justice Bayley, at the Old Bailey sessions, September, 1809, on the statute 39 G. 3. c. 85. (a) for embezzling three shillings which he received for and on account of his masters, James Clarke and John Giles.

It appeared from the evidence, that the prosecutors desired a neighbor, one Francis Moxon, to go to their shop and purchase some articles, in order that they might discover whether the prisoner put the money which he received for the goods sold into the till; the prosecutors supplied Moxon with three shillings of their own money for this purpose, which money they marked. Moxon went to the shop, bought the articles, and paid the prisoner the three shillings. The prisoner embezzled the money.

It was urged on behalf of the prisoner, that the prosecutors had constructively the possession of this money up to the time of the embezzlement, and that they had parted with nothing but mere custody. The prisoner, it was contended, might have been indicted for larceny at common law, but that the statute did not apply to cases where the money before its delivery to the servant had been in the masters' possession, and might legally be considered the masters' at the time of such delivery, as Moxon, in the case, was the masters' agent, and his possession theirs.

The learned judge, before whom this case was tried, thought it deserved consideration, and reserved the point for the opinion of the judges.

In Michaelmas term, 1809, the judges met and held the conviction right, upon the authority of Bull's case, (b) in which the judges, upon similar facts held a common law indictment could not be supported. It seemed to be the opinion of the judges that the statute did not apply to cases which are larceny at common law.

(a) Which enacts, That if any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk to any person whomsoever, shall, by virtue of such employment, receive or take into his possession any money, goods, &c. or effects, for or in the name or on the account of his master or employer, and shall fraudulently embezzle, secrete or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, or employer, for whose use or in whose name or on whose account the same was or were delivered or taken into the possession of such servant or clerk, or other person so employed, although such money, goods, &c., was or were so taken or received into the possession of his or their servant, clerk, or other person so employed.

(b) Cited in Bazeley's case, 2 Leach, C. C., 841. S. C. 2 East, P. C. *notis.*

REX v. WILLIAM SULLENS.

1 Moody Crown Cases 129.

A servant sent, by his masters to get change for a note, &c. who embezzles the change, is not liable at common law for stealing but must be indicted under the 39 G. 3, c. 85. (a)

Crown Case Reserved—Easter Term 1826.

The prisoner was tried before Alexander, C. B., at the spring assizes for the county of Essex, in the year 1826, on an indictment at common law: the first count of which charged the prisoner with stealing at Doddinghurst, on the 25th of September, 1825, one promissory note, value 5 £, the property of Thomas Nevill and George Nevill, his masters; the second count with stealing silver coin, the property of Thomas Nevill and George Nevill.

It appeared in the evidence that Thomas Nevill, the prisoner's master, gave him a 5 £ country note, to get change, on the 25th of September; that he got change, all in silver, and on his obtaining the change he said it was for his master, and that his master sent him. The prisoner never returned.

The jury found the prisoner not guilty on the first count, but guilty on the second count.

The question reserved for the consideration of the judges was, whether the conviction was proper, or whether the indictment should not have been on the statute 39 G. 3, c. 85, for embezzlement.

In Easter Term, 1826, the judges met and considered the case, and held that the conviction was wrong, because as the masters never had possession of the change, except by the hands of the prisoner, he was only amenable under the statute 39 G. 3, c. 85. (b)

(a) Repealed by 7 & 8 G. 4, c. 27, and in substance re-enacted by 7 & 8 G. 4, c. 29, s. 47.

(b) *Rex. v. Headge*, Russ. & Ry. C. C. R. 160. *Rex. v. Walsh*, ib. 215.

REX v. WILLIAM BATTY.

2 Moody Crown Cases 329.

A person employed by A. B. to sell goods for him at certain wages may be convicted of embezzlement as the servant of A. B., though at the same time employed by other persons and for other purposes.

Crown Case Reserved—Easter Term 1842.

The prisoner was tried before Mr. Justice Wightman at the York spring assizes, in the year 1842, upon an indictment charging him with embezzlement of money received by him in the course of his employment, as the servant of one Samuel Wilkes Wand. The prisoner was a clerk in the employ of a railway company at one of their stations, but he was also employed by Wand to sell coals and lime for him, for which service Wand paid 10 s. weekly. He was also employed by a person of the name of Gascoigne to sell coals for him. It did not appear that the

prisoner devoted any particular portion of his time to the service of the prosecutor or of Gascoigne.

The question is, whether the defendant was the servant of Wand within the meaning of the statute 7 & 8 Geo. 4, c. 29, s. 47.

This case was considered at a meeting of all the judges except Lord Abinger, C. B., Gurney, B., and Coleridge, J., in Easter term, 1842, and the conviction was affirmed. The wages made the prisoner a servant.

McELROY v. PEOPLE.

202 Ill. 473.—66 N. E. Rep. 1058.

Opinion filed April 24, 1903.

EMBEZZLEMENT—PRACTICE: *One good count may sustain verdict.*, *Agent working on commission—Misleading instruction—Instruction refused*
—Evidence insufficient—*Improper methods employed by the prosecution.*

1. A general verdict of guilty will sustain a conviction where one or more of the several counts are good.
2. Under the statute, in order to constitute the crime of embezzlement the fraudulent conversion must be of property belonging exclusively to a person other than the one charged.
3. An agent employed to solicit subscriptions on commission and authorized to deduct her commissions from the amount collected is joint owner with the principal of the gross amount collected, and her conversion of the money is not embezzlement.
4. If the jury are instructed, at the instance of the People, that they may, in weighing the testimony of the accused, consider whether she has been contradicted by other witnesses, the accused is entitled to have the jury instructed that they may also consider whether she has been corroborated by credible evidence.

Writ of error to the Criminal Court of Cook county; Hon. Abner Smith, Judge, presiding.

Ellen McElroy, convicted of *embezzlement*, brings error. Reversed.

P. H. Moroney and *Samuel Richolson* for the plaintiff in error.

H. J. Hamlin, Attorney General, *Charles S. Deneen*, State's Attorney and *F. L. Barnett*, for the People.

Mr. Justice Wilkin delivered the opinion of the court:

Plaintiff in error was convicted in the Criminal Court of Cook County of the crime of larceny by embezzlement, and

sentenced to the penitentiary. The indictment contained eight counts. The first six are in substantially the language of section 75 of the Criminal Code, (Hurd's Stat. 1901, p. 604,) charging that she was an agent, to wit: a collector and solicitor, for the Catholic Press Company, and as such collected and embezzled the funds of the company to the amount of \$106.50. The seventh count charged her with simple larceny, and the eighth with receiving money knowing it to be stolen. There was a motion to quash the indictment and each count thereof, which was overruled, and that ruling is here assigned as error.

The seventh count was bad, (*Kibs v. People*, 81 Ill. 599) but the first six are good. (*Lycan v. People*, 107 Ill. 423; *Ker v. People*, 110 id. 627.) There was a general verdict of guilty, and the rule is, that where there are several counts and the verdict is general, one or more good counts will sustain the conviction.

Among other defenses relied upon, it was insisted that the money which the defendant was charged with embezzling was a sum in which she had an interest by way of commissions. She was employed by one Hubbard, manager of the Catholic Press Company. The agreement was by parol. Both she and Hubbard testified that by the contract of employment she was to solicit subscriptions for a publication called *The New World*, and receive a commission of fifty cents for each cash subscriber of two dollars. If charged on the books she was to receive but forty cents, and for each cash subscription which "lapsed" she was to refund ten cents. Hubbard claimed that the gross amount received by her was to be brought in weekly and paid to him, out of which he was to pay her the commissions. Her contention was that she was to retain the amount of her commissions out of the collections and only pay over the balance. The weight of the testimony supports her understanding of the contract. Hubbard said, on cross-examination: "The understanding I had with this woman was that she was to work on a commission. She had the right to deduct her commissions if there was anything to deduct from." The employment was from March 1, 1901, to about the end of the year. During the fall, in August and September, he wrote her certain letters, in one of which he stated: "On examining your accounts to date I find that you owe us \$106.50, net." When asked what he meant by using the word "net," he answered, "Why, after all her compensation had

been paid." And again: "Does this letter in which you say, 'on examining your accounts to date I find that you owe us \$106.50, net,' mean that she had a right to retain her commissions? How do you make up that account?" He answered: "After giving her all her commissions I find she owed us \$106.50. I gave her forty cents for each subscriber she reported, and then I took the collections which she paid in and also some she had not, and gave her the benefit of the collections she had not paid on the presumption that she would pay it some day."

Section 75, *supra*, is as follows: "If any officer, agent, clerk, or servant of any incorporated company; or if a clerk, agent, servant or apprentice of any person or co-partnership, or society, embezzles or fraudulently converts to his own use, or takes and secretes with intent so to do, without the consent of his company, employer or master, any property of such company, employer, master, or another, which has come to his possession, or is under his care by virtue of such office or employment, he shall be deemed guilty of larceny." By this statute, in order to constitute the crime of embezzlement the fraudulent conversion must be of the property of another. If the plaintiff had a right to deduct her commissions from the gross amount collected, then to that extent the money belonged to her,—that is, she and the company owned the gross sum jointly. The law is, that where a defendant has an interest in the property or money alleged to have been fraudulently converted to his or her own use there can be no conviction of the crime of embezzlement. (10 Am. & Eng. Ency. of Law, 985, and cases cited in note 7). In the case of *State v. Kusnick*, 45 Ohio St. 535, there cited. (reported in 4 Am. St. Rep. 567.) the court said: "It is true that at common law, to constitute larceny, the thing alleged to have been stolen must be the property of another person than the offender. It is also true that the statutes of nearly all the States which undertake to define embezzlement, require that the subject of the offense shall be shown to be property of another; and this has almost universally been construed to mean that it must be wholly the property of another."

In the case of *State v. Kemp*, 22 Minn. 41, (21 Am. Rep. 764,) the defendant was collector of pew rents for a church, under an agreement that he was to have five per cent of all the rents, no matter who collected them. He failed to turn over all

the money collected and was indicted for embezzlement under a statute similar to ours, and the court said: "The effect of this agreement was to vest in the defendant an undivided one-twentieth interest in the rents collected, and to that extent make him the owner jointly with the corporation. In other words, the money was not the property of the corporation, but the joint property of the corporation and the defendant. It was, therefore, not the property of another than the defendant.

In *Commonwealth v. Libby*, 11 Metc. 64, (45 Am. Dec. 185.) the defendant had been employed by a firm of newspaper publishers to collect bills for a certain commission, and he, as was alleged, failed to pay over certain collections made by him but converted the same to his own use. In deciding the case the Supreme Court of Massachusetts said: "In the case of domestic servants, and to some extent in the case of special agency, the right of the property and the possession continues in the principal, and a disposal of the property would be a violation of the trust and an act of embezzlement. But the case of commission merchants, auctioneers, and attorneys authorized to collect demands, stands upon a different footing, and a failure to pay over the balance due their employers upon their collections will not submit them to the heavy penalties of embezzlement."

Other authorities are to the same effect, and the cases which seem to announce a different doctrine are founded upon statutes unlike ours.

The jury was instructed, at the instance of the People, that "as a matter of law an agent engaged in the service of another, selling goods on commission on such sales, will be guilty of embezzlement in appropriating to his or her own use money so collected, where, by the terms of his employment, he is required to remit or pay over such collections to his principal and is not permitted to mingle the same with his or her own money." This instruction had no proper application to the case. The defendant was not employed in selling goods on commission or percentage for the company, and it was clearly misleading and erroneous when applied to the facts in this record.

The defendant asked the court, but the court refused, to instruct the jury on her behalf, "that if they believed, from the evidence, that she was, at the time of the alleged embezzlement, a collector for the company with the right to retain her com-

missions—that is, that she was not required to pay over to the company the gross sum or sums of money collected by her, but might first deduct her commissions and then pay over the balance or net amount due the company,—she was not such an agent or servant as it contemplated in the statute defining embezzlement, and the verdict should be not guilty.” This instruction, under the foregoing authorities, laid down the proper rule of law, and it was error to refuse it.

Defendant also asked the following instruction, which was refused:

“The defendant is a competent witness in her own behalf, and you have no right to discredit her testimony from caprice nor merely because she is the defendant. You are to treat her the same as any other witness, and subject her to the same tests, and only the same tests, as are legally applied to other witnesses, and while you have the right to take into consideration the interest she may have in the result of this trial, you have also the right, and it is your duty, to take into consideration the fact, if such is the fact, that she has been corroborated by other credible evidence.”

At the instance of the People the court had instructed the jury that “the defendant was permitted to testify in her own behalf, and in doing so became the same as any other witness, her credibility to be tested by and subject to the same tests as are legally applied to any other witness, and in determining the degree of credibility that shall be accorded to her testimony the jury have a right to take into consideration the fact that she is interested in the result of this prosecution, as well as her demeanor and conduct upon the stand, and the jury are also to take into consideration the fact, if such be the fact, she has been contradicted by other witnesses.” If the jury had the right, as they undoubtedly did, to consider whether she had been contradicted by other witnesses in giving weight to her evidence, why, in common justice, was she not entitled to have the jury told to take into consideration the fact, if such was the fact, that she had been corroborated by other credible evidence? We think the court erred in refusing to give the instruction asked, to that effect.

We are also of the opinion that the evidence failed to prove with that degree of certainty required by the rules of evidence

in criminal cases, that the defendant fraudulently converted to her own use, or took and secreted with intent so to do, without the consent of her employer, the money in question. The only evidence of a criminal intent is the inference to be drawn from the act itself. She at no time denied or attempted to conceal the indebtedness. In answer to the letters of Hubbard she went several times to his office for an accounting, and explained to him how she came to use the money, promising to pay it as soon as she could mortgage some property or otherwise procure the amount. He caused her arrest, and then directed the officer to let her go upon her promise to raise the money within a given time. Two months later he again had her arrested, because, as he said she had not lived up to her agreement in regard to paying the money. While she was not justifiable in using money belonging to her employer, it does not follow that she was guilty of the crime of embezzlement. The criminal law cannot be properly used by individuals to enforce the payment of debts, and that seems to have been the motive of the prosecuting witness in putting this prosecution upon foot.

It is assigned for error "that the trial court made remarks and comments at the trial, and in the presence of the jury, which were prejudicial to the defendant." We regret to say that the abstract of the record in this case shows substantial grounds for that alleged error, but as the judgment below must be reversed for the reasons above stated, we refrain from further commenting upon this branch of the case.

The judgment of the Criminal Court will be reversed and the cause remanded for another trial.

Reversed and remanded.

LOVING V. STATE.

44 Tex. Crim. Rep. 373—71 S. W. Rep. 277.

Decided December 17, 1902.

EMBEZZLEMENT: *Doubtful evidence—Failure to instruct as to grade of offense.*

1. The indictment alleged that the defendant as recording and financial secretary embezzled the funds of a lodge, but the evidence indicated that the duties of caring for the money of the lodge rested with

the permanent secretary and did not clearly show whether these terms referred to the same office or different offices. "Matters of this serious character should not be left in this confused condition, where the liberty of a citizen is involved."

2. Where money is received in small amounts and the evidence of conversion, if any shown, is circumstantial, the court should instruct the jury as to petty embezzlement.
3. The case partakes more of that of a civil matter than of a criminal offense.

Appeal from District Court of Lamar; Hon. Ben H. Denton, Judge.

R. J. Loving, convicted of embezzlement, appeals. Reversed.

Hale, Allen & Dohoney, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of embezzlement, and given three years in the penitentiary.

The indictment alleges that appellant was agent, employe, officer, recording and financial secretary, of the Odd Fellows Lodge, and that as such agent, employe, and officer, recording and financial secretary, he embezzled \$205, lawful current money of the United States of America, which had come to his possession and under his care by virtue of such agency, office, and employment. A brief synopsis of the evidence for the purposes of this opinion may be thus stated: Appellant was holding the office indicated in the indictment, and received money in small sums, due to the lodge, ranging from a few dollars to \$50 in amount; the total aggregating something over \$700, as claimed by the lodge. In making out his returns to the grand lodge of the order, he only accounted for \$501. A committee was appointed by the lodge to investigate the matter. There were two or three attempted meetings between this committee and appellant, and finally a meeting between the committee and appellant's attorney; the lodge claiming a deficit of \$226, and appellant asserting he owed the lodge nothing. This alleged discrepancy led to heated discussion in the lodge room, as well as with the committee; appellant becoming angry and using denunciatory language, asserting most emphatically that he owed the lodge nothing, but, if by arbitration it was discovered that he did, he was ready and willing to pay it. Finally Brooks was

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selected to arbitrate the matter, and upon his decision appellant paid over \$177, which seems to have settled the matter, so far as any deficiency is concerned. Appellant was the secretary of this lodge from the 10th of January until the 10th of July, and the theory of the State is that this money was collected during that time, and the evidence was introduced in support of this theory. From the receipt books, two or more of the receipts had been torn out. This is not shown to have occurred while defendant had charge of the book, and when those receipts were taken from the book is not made to appear.

There are several questions raised as to the sufficiency of the evidence. One contention is that the evidence fails to show that appellant occupied the position in the lodge which authorized him, by virtue of his office, to receive the money due the lodge. The language employed in the statement of facts tends to substantiate this proposition. It seems that under the rules of the lodge the "permanent secretary" was the officer upon whom devolved this duty. Whether the "recording and financial secretary" is the "permanent secretary," or whether they are different offices, is not explained. If the permanent secretary is a different officer from the recording and financial secretary, and it is the duty of the permanent secretary, as such officer, to receive the money, and it was not the duty of the recording and financial secretary to receive it, then the fiduciary relation constituted by the statute of embezzlement is not shown. Matters of this serious character should not be left in this confused condition, where the liberty of a citizen is involved. It is also contended that the evidence is not sufficient to support the conviction. While we pretermit deciding this question, yet we will say that the evidence is not satisfactory. The same may be said in this case as in the Stallings Case, 29 Tex.-Crim. App. 220, 15 S. W. 716,—that it partakes more of an adjustment of a court of civil jurisdiction than in a criminal trial. It may be that upon a full elucidation of the facts the matter can be made to appear differently. It occurs to us that the evidence of fraud is not satisfactory.

There is a question which clearly requires a reversal of the judgment. The money came into the hands of appellant in small amounts at various times. If in fact any of it was embezzled, it was shown by circumstances only; that is, simply by

reason of the fact that he received the money, and, in making out his grand lodge report, failed to account for all of it in that report. The State did not undertake to prove or show embezzlement, except the two facts that the money passed into his hands, and it was not accounted for in the grand lodge report. It is not attempted to be shown that he used any of the money. The court submitted only the theory of a felonious embezzlement. The question was properly raised in the trial court, and is submitted here, that the issue of a petty embezzlement should have been given in charge. If there was an embezzlement of any amount, and that amount was less than \$50, appellant was not guilty of a felony; and, in the absence of testimony satisfactorily showing a felonious embezzlement, the inferior degree of the offense should have been submitted to the jury. On issues of fact the accused is entitled to the benefit of the doubt. When there is a doubt of fact as to the grade of the offense, the jury should be instructed appropriately in regard to the minor degree. The presumption obtains that, as between felony and misdemeanor, there being issues upon those questions, the accused is innocent of the greater offense.

The judgment is reversed and the cause remanded.

Reversed and remanded.

STATE V. RIGALL.

169 Mo. 659—70 S. W. Rep. 150.

Decided October 27, 1902.

EMBEZZLEMENT—RECORD—PRACTICE—EXCEPTIONS: *What are properly matters, exclusive of a bill of exceptions—Failure to instruct as to intent.*

1. A motion to require the Prosecuting Attorney to elect as to one of several transactions and the exception to the ruling thereon, under the Missouri statutes, should be made apparent by a bill of exceptions. It was not sufficient, that the exception appears from an entry made by the clerk.
2. Failure to instruct the jury that a conversion, to constitute embezzlement, must be fraudulent, is reversible error.

Appeal from Circuit Court of Jasper County; Hon. Joseph D. Perkins, Judge.

J. D. Rigall, convicted of embezzlement, appeals. Reversed.

T. B. Haughawout, for the appellant.

Edward C. Crow, Attorney General, for the State.

BURGESS, J. From a conviction in the Circuit Court of Jasper County, under an indictment charging him with the embezzlement of seven hundred and fifty dollars, the moneys of one C. M. Leftcovitch, and fixing his punishment at two years' imprisonment in the State penitentiary, defendant, after an unavailing motion for a new trial, appeals.

It appeared from the evidence that there were two or three different moneyed transactions between Mrs. Leftcovitch and defendant before the finding of the indictment against him, by which her moneys passed into his hands, and the record shows that after the evidence was all in, but before the case was submitted to the jury, defendant filed his motion to require the State to elect upon which one of these transactions it would elect to proceed. The motion was overruled but defendant did not properly save an exception to that ruling. It is true that it does appear from the record that defendant saved his exception at the time, but it does not so appear from the bill of exceptions, and being a matter of exception, could only become a part of the record by bill of exceptions, and the entry by the clerk upon his minutes that defendant "excepted and saves his exceptions" was of no significance what ever. [State v. Marshall, 36 Mo. 400.] There is a manifest difference under our statutes between what is properly matter of error and exception. In *Bateson v. Clark*, 37 Mo. 31, it is said: "By the Revised Code of 1855, p. 1300, § 33 [section 864, R. S., 1899], no exception shall be taken in appeal or writ of error to any proceeding in the Circuit Court, except such as shall have been expressly decided by such court; but section 35 of same chapter [Sec. 866, R. S., 1899], requires this court to examine the record and award a new trial, to reverse or affirm the judgment, or to give the proper judgment as may seem agreeable to law. The record proper, by law, is the petition, summons, and all subsequent pleadings, including the verdict and judgment; and these the law has made it our duty to examine and revise; and, if any error is apparent on the face of these pleadings which constitute the record, we will reverse the cause, whether any exceptions were taken or not.

Exception is matter which arises wholly from the action of the court in the progress of the trial, as the admission or rejection of evidence, the sustaining or overruling some motion, the giving or refusing instructions, etc. This is strictly no part of the record, unless made so by being incorporated in a bill of exceptions; and to entitle it to any notice, or be made available here, the action of the court must have been excepted to at the time the alleged error was committed." It follows that this point is untenable.

It is said that the court erred in failing to instruct the jury that they must believe from the evidence beyond a reasonable doubt that defendant feloniously or fraudulently—that is, intentionally—converted the money to his own use, before they could find him guilty of embezzlement. Upon this feature of the case, the court, over the objection of defendant, instructed the jury as follows:

"The court instructs the jury that if you believe from the evidence in this case that on or about the fifteenth day of April, 1899, in the county of Jasper and State of Missouri, defendant, J. D. Rigall, was the agent of Mrs. C. M. Leftcovitch, and that he, the said defendant, was then and there over the age of sixteen years, and that he, the said J. D. Rigall, did then and there, by virtue of his said agency, have, receive, and take into his possession or under his care and control money belonging to the said Mrs. C. M. Leftcovitch, and that the defendant did then and there convert to his own use thirty dollars or more of the said money belonging to the said Mrs. C. M. Leftcovitch, which came into his possession and under his care and control by virtue of his being the agent of the said Mrs. C. M. Leftcovitch, with the intention then and there to convert the said money to his own use without the assent of the said Mrs. C. M. Leftcovitch, you should find the defendant guilty of embezzlement, as he stands charged in the indictment, and assess his punishment at imprisonment in the penitentiary for a term not less than two nor more than five years."

It will be observed that this instruction authorized the conviction of defendant if he converted the money to his own use without the consent of Mrs. Leftcovitch, whether he did so with a fraudulent intent or not. In *State v. Schilb*, 159 Mo. 130, 60 S. W. 82, it is said: "It is well settled that no one can be con-

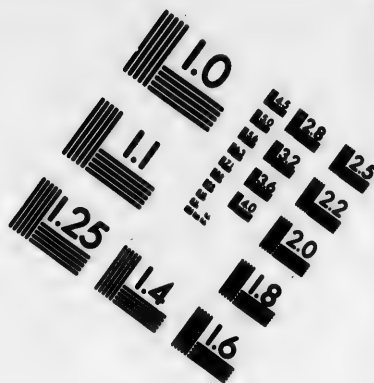
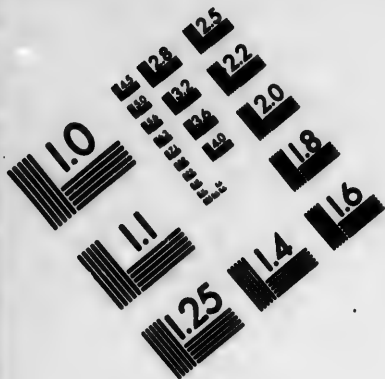
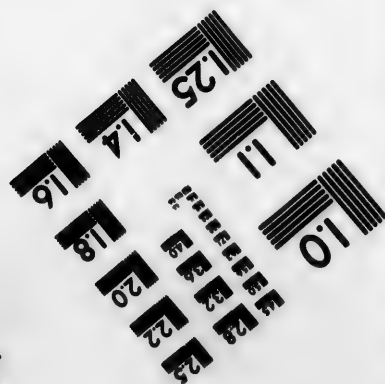
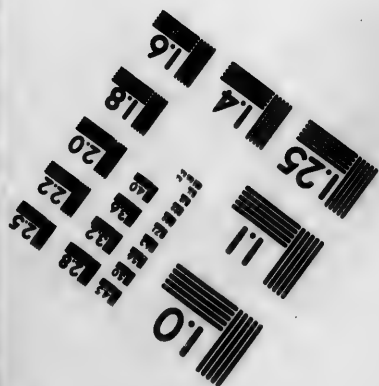
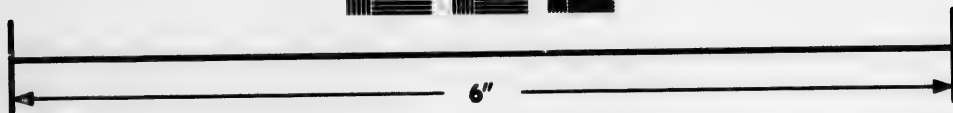
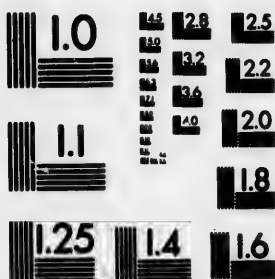


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victed of felony in this State in the absence of an intent to do a criminal act (*State v. Noland*, 111 Mo. 473, 19 S. W. 715; *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282), but such intent, in case of embezzlement, may be inferred from a felonious or fraudulent conversion. In Bishop's New Criminal Law, Vol. 2, Secs. 372, 373, 379, it is said: "The gist of common-law larceny is the felonious 'taking' of what is another's, with the simultaneous intent in the taker of misappropriating it; but in the statutory embezzlement there is no felonious taking, for the thing comes to the servant by delivery, either from the master or a third person, so that the question now is, by what act, after it is received, does the servant commit the embezzlement? The rule of law appears only indistinctly in the books. Still we may infer from the authorities, and from the reasons inherent in the question, that, if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing less is sufficient; or, assuming the needful criminal intent to exist, he must and need only do what in our civil jurisprudence is termed 'conversion,' defined to be any dealing with the thing which, impliedly or by its terms, excludes the owner's dominion. To illustrate: if the servant, instead of delivering the property to his master or another, as required by his duty, pledges it for his own debt, or runs away with it, or neglects or refuses to account for it, or otherwise wrongfully diverts its course towards its destination to make it his own, he embezzles it. The felonious or otherwise fraudulent intent is an essential element, yet, if a man commits the act of embezzlement, the presumption is that he means to embezzle." [*Spalding v. People*, 172 Ill. 55, 49 N. E. 993; *State v. Noland*, 111 Mo. 473, 19 S. W. 715; *Dotson v. State*, 51 Ark. 119, 10 S. W. 18; *People v. Wadsworth*, 63 Mich. 500, 30 N. W. 99; *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282.]

If the word "fraudulently" had been inserted before the words "then and there" in the instruction, it would have been complete.

For the error indicated, the judgment is reversed, and the cause remanded. All concur.

HINKLE v. COMMONWEALTH.

23 Ky. Law Repr. 1988—66 S. W. Rep. 816.

Decided February 26, 1902.

ESCAPE: *Indictment in the language of the statute, sufficient—Refusal to surrender a deadly weapon—Forcible escape from the officer—Presumption, that an officer will protect his prisoner from harm—Weight of the evidence, a matter for the jury—Prosecuting Attorney's opening statement.*

1. An indictment following the language of the statute creating the offense is sufficient.
2. The accused had been arrested by a deputy sheriff, upon a warrant, and taken before a magistrate. Being in possession of a pistol and refusing to give it up, the deputy sheriff attempted to take it from the accused, who resisted and putting the officer in fear of personal injury escaped from him. The prisoner had taken the pistol from one Steele, whom he claimed was seeking to recover it and had threatened to shoot him. Held:—The presumption is, that an officer will protect his prisoner from harm, and the accused's claim of danger was not a valid excuse for his escape.
3. The evidence being conflicting, the weight was to be determined by the jury.
4. The Prosecuting Attorney need not make any opening statement beyond reading the indictment to the jury.

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

George Hinkle, convicted of the offense of forcibly effecting his escape from an officer, appeals. Affirmed.

B. B. Golden, for the appellant.

Robt. J. Brekinridge, for the Commonwealth.

GUFFY, C. J. The defendant in this case was indicted, tried, convicted, and sentenced to six months' imprisonment in the county jail upon an indictment charging him with forcibly effecting his escape from an officer at a time when he was lawfully arrested, etc., and, his motion for a new trial having been overruled, he prosecutes this appeal.

The indictment reads as follows: "The grand jury of Knox County, in the name and by the authority of the Commonwealth of Kentucky, accuses George Hinkle of the offense of forcibly effecting his escape from an officer at a time when he was lawfully arrested and in custody upon a charge for a violation of the

criminal and penal laws, committed in manner and form as follows, to wit: The said Hinkle did, on the 5th day of December, 1900, in the County, Circuit, and State aforesaid, and before the finding of the indictment herein, unlawfully and forcibly effect his escape and escaped from A. M. Hemphill, who was at the time a deputy sheriff of Knox County, Kentucky, and acting as such, who had the said Hinkle lawfully under arrest and in his custody as deputy sheriff, aforesaid, upon a charge of assault and battery upon the person of Harve Steele; against the peace and dignity of the Commonwealth of Kentucky." The grounds relied upon for a new trial are in substance: (1) That the court erred in overruling the demurrer to the indictment; (2) because the court erred in permitting incompetent evidence prejudicial to the defendant to go to the jury; (3) because the court erred in refusing competent evidence favorable to defendant, and offered by him; (4) because the court misinstructed the jury, and refused to properly instruct the same; (5) because the verdict is against the law and evidence; (6) because of the misconduct of the attorney for the Commonwealth in the argument of the case; (7) because the court erred in overruling defendant's motion, at the close of the plaintiff's evidence, to instruct the jury to find him not guilty, and in overruling defendant's motion to instruct the jury to find him not guilty at the close of all the evidence. This indictment was found under section 1338, Ky. St., which section reads as follows: "If a prisoner fined, on a sentence of imprisonment or to be whipped or under a *capias* escapes jail, or if a person lawfully arrested upon a charge for a violation of the criminal and penal laws forcibly or by bribery effects his escape from an officer, or guard, he shall be confined in jail not less than six nor more than twelve months." This indictment was evidently found under this section of the statute, and it has often been held that, where a statute creates an offense, an indictment following the language of the statute is sufficient. It therefore follows that the demurrer to the indictment was properly overruled. It is not necessary, in an indictment under this section, to set out by specific facts that the defendant was legally under arrest; nor is it necessary to state the acts by which the defendant effected his escape from the officer.

We fail to see that the court erred as to the admission or

rejection of testimony upon the trial of the cause. We deem it unnecessary to recite the testimony introduced in the action. We may, however, remark that the testimony upon the part of the Commonwealth tends to show that the deputy sheriff, Hemphill, had a warrant for the arrest of the defendant, and that it was made known to the defendant that said Hemphill had such warrant, and that the defendant accompanied Hemphill to and in the presence of the magistrate who had issued the warrant, and that defendant had in his hands or in his possession a pistol, and, being required to surrender the same, refused so to do, and when the deputy sheriff attempted to take the pistol from him he (defendant) refused to surrender the same, and by demonstrations of violence, and by putting the officer in fear of personal injury, escaped from or left the place, and refused to surrender the pistol or submit himself to the control of the magistrate or the deputy sheriff. It is true that other evidence was introduced tending to show that a former deputy sheriff had assumed to place the defendant under arrest, and sent him to a different place to remain; but it does not appear that the first-named deputy sheriff (who was the father of the defendant) had any warrant for the arrest of the defendant. It also appears that the defendant claimed that one Steele, with whom he had had a difficulty, and from whom he had taken the pistol in question, was seeking to obtain and threatening to obtain a pistol for the purpose of shooting the defendant. This, in our opinion, does not constitute a sufficient defense for the defendant, and did not authorize him to escape from the deputy sheriff who had the warrant of arrest, and who, in obedience to the magistrate, attempted to obtain control of the defendant and disarm him. The presumption must be indulged that the officer of the law would see to it that a prisoner under arrest was protected from violence. In addition to all this, the jury, who heard all of the testimony, must be presumed to have considered the evidence, and the most favorable view that can be taken in behalf of the defendant is that the evidence was conflicting, and under the provisions of the Code of Practice this court cannot reverse on account of the insufficiency of the evidence, if there be any evidence tending to show the defendant guilty of the offense charged.

We fail to perceive that the attorney for the Commonwealth was required to do more than he did in stating his case after

reading the indictment to the jury, and it would seem that a plea of not guilty was entered. We are not aware of any rule of law that imperatively requires the attorney for the Commonwealth to state more in detail the character of the charge or evidence to be introduced in support thereof.

Judgment affirmed.

NOTE (By J. F. G.)—*A lawyer's satire, which was given official publication in the Kansas Reports.*

One George Lewis was imprisoned in a Kansas jail on a charge of burglary. He escaped, but was recaptured, placed upon trial and was acquitted. He was then tried, convicted, and sentenced to two years in the penitentiary, under a statute which reads as follows:

"Sec. 183. If any person lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute, shall break such prison or custody and shall escape therefrom he shall upon conviction be punished by confinement and hard labor for a term not exceeding two years, or in a county jail not less than six months."

He appealed to the Supreme Court, and notwithstanding the fact that he had been acquitted of the burglary, the Supreme Court held that he was guilty of escaping "before conviction." The case is reported as follows, *State v. Lewis*, 19 Kans. 260; to which the official reporter adds the following interesting and humorous note:—

REPORTER'S NOTE.—The peculiar features of the foregoing case of *The State v. Lewis*, seems to justify the inserting here of the "poetical report" thereof written by EUGENE F. WARE, 1st, attorney of law at Fort Scott, and which he published in the "Fort Scott Daily Monitor," of 10th March, 1878. Mr. Ware's report is as follows:—

IN THE SUPREME COURT, STATE OF KANSAS.

George Lewis, *Appellant, ads.* The State of Kansas, *Appellee.*

(Appeal from Atchison County.)

SYLLABUS.

Law—Paw; Guilt—Wilt. When upon thy frame the law—places its majestic paw—though in innocence, or guilt—thou are then required to wilt.

Statement of Case, by Reporter:

This defendant, while at large,
Was arrested on a charge
Of burglarious intent,
And direct to jail he went.
But somehow he felt misused,

And through the prison walls he oozed,
And in some unheard-of shape
He effected his escape.

Mark you, now: Again the law
On defendant placed its paw,
Like a hand of iron mail,
And resocked him into jail—
Which said jail, while so corraled,
He by sockage-tenure held.

Then the court met, and they tried
Lewis up and down each side,
On the good old-fashioned plan;
But the jury cleared the man.

Now, *you* think that this strange case
Ends at just about this place.
Nay, not so. Again the law
On defendant placed its paw—
This time takes him round the cape
For effecting an escape;
He, unable to give bail,
Goes reluctantly to jail.

Lewis, tried for this last act,
Makes a special plea of fact:
"Wrongly did they me arrest,
"As my trial did attest,
"And while rightfully at large,
"Taken on a wrongful charge.
"I took back from them what they
"From me wrongly took away."

When this special plea was heard,
Thereupon THE STATE demurred.

The defendant then was pained
When the court was heard to say
In a cold impassive way—
"The demurrer is sustained."

Back to jail did *Lewis* go,
But as liberty was dear,
He appeals, and now is here
To reverse the judge below.
The opinion will contain
All the statements that remain.

Argument and Brief of Appellant:

As a matter, sir, of fact,
Who was injured by our act,
Any property or man?—
Point it out, sir, if you can.

Can you, seize us when at large
On a baseless, trumped-up charge;
And if we escape, then say
It is *crime* to get away—
When we rightfully regained
What was wrongfully obtained?

Please-the-court-sir, what is crime?
What is right and what is wrong?
Is our freedom but a song—
Or the subject of a rhyme?

Argument and Brief of Attorney for the State:

When THE STATE, that is to say,
We take liberty away,—
When the padlock and the hasp
Leaves one helpless in our grasp,

It's unlawful then that he
Evens *dreams* of liberty—
Wicked dreams that may in time
Grow and ripen into *crime*—
Crime of dark and damning shape;
Then, if he perchance escape,
Evermore remorse will roll
O'er his shattered, sin-sick soul.

Please-the-court-sir, how can we
Manage people who get free?

Reply of Appellant:

Please-the-court-sir, if it's *sin*,
Where does *turpitude* begin?

Opinion of the Court. PER CURIAM:

We-don't-make-law. We are bound
To interpret it as found.

The defendant broke away;
When arrested, he should stay.

This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur.

(Note by the Reporter):

Of the sheriff—rise and sing.
"Glory to our earthly king!"

STATE V. BLACKLEY.

131 N. C. 726—42 S. E. Rep. 569.

Decided October 28, 1902.

ESCAPE: *Prisoner rescued under pretense of lynching—Erroneous instruction assuming guilt from the defendant's testimony—Peculiar statute as to burden of proof.*

1. Under the peculiar provisions of the statute, declaring, that when a *prima facie* case of escape is made out, that the burden is on "the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence," the court instructed the jury that if the defendant's testimony was believed the verdict should be guilty. The defendant testified, among other statements, that a body of armed and masked men with force took the prisoner from him; that shots were fired from each side, but no one was hurt; that at the time he was afraid the prisoner was about to be lynched. Held, that the instruction was erroneous.
2. Even if it were a fact, that the display of force was a subterfuge, and the attacking party were friends of the prisoner, and so known to be by the defendant, the question of good faith was one for the jury and not for the court.

Appeal from Superior Court, Granville County; Hon. Thomas J. Shaw, Judge.

F. M. Blackley convicted of allowing a prisoner to escape from his custody, appeals. Reversed.

Royster & Hobgood and *J. W. Graham*, for the defendant.
Robert D. Gilmer, the Attorney General, for the State.

FURCHES, C. J. This was an indictment for an escape, under section 1022 of The Code. The defendant was a constable in

Granville County, and one Rogers was put in his custody, with a *mittimus* from the justices of the peace who had investigated the case, against Rogers, upon a warrant charging him with rape. The facts, that the defendant was a constable, that Rogers was tried upon a warrant charging him with rape, that sufficient cause was found to commit him to jail, and that he was committed to the custody of the defendant, with a *mittimus*, were shown in evidence, and are not denied. This made a *prima facie* case of guilt against the defendant, under section 1022 of The Code, and threw the burden on the defendant of showing that he was not guilty. The statute itself provides that, after the *prima facie* case is made out, "it shall then lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence."

The defendant, for the purpose of showing that he was not guilty, went upon the witness stand in his own behalf, and testified as follows:

"Rogers was committed to my custody by the justices of the peace about eight o'clock in the evening. I took him to Lyon's store, and the justices wrote out *mittimus* and handed it to me. C. H. Parham came to me at the store, and said there was a crowd coming out from Oxford to lynch Rogers, and I heard this from several other parties. Pete Kearney, Phil. White, Tom Mitchell, and others whose names I do not recall, told me so. There had been several lynchings in Granville County. I had no buggy at the place of trial. I lived two miles from there by the road, but one and a quarter miles by path. When I heard these rumors about the lynching, I took Rogers and Phil. White, and when I got into the woods I told Phil. White to go and summon some men and arm them, and to bring them on to my house, and that we would do something to protect this man. I arrested Rogers on the Saturday before, and this was on Tuesday night. I had had him in my custody from then until the trial. I did not put him in the jail. The justices of the peace told me to keep him in my custody until Tuesday, when the trial was had. I did keep him in my custody, and he made no attempt and showed no disposition to escape. After I sent Phil. White back, I went on to Mr. Dement's house, and woke him up, and summoned him to help me. I then went to my own house, and saw

Ed. Blackley, who is no kin to me, but about twelfth or thirteenth cousin, and works at my place, and summoned him as a guard. I carried the prisoner to my house, but did not keep him there, on account of my wife's condition. She was nervous and delicate, —had been an invalid for two years. I went from my house first to the cornfield, and the dew was so heavy that Mr. Dement suggested that we go back into the old field. Ed. Blackley went after our supper and brought it, and after we had eaten it we agreed to carry Rogers a mile away. It was pretty quick after supper that I saw a crowd coming. It was bright moonlight, and they were in their shirt sleeves. They shot four or five times when they were about as far as across the courthouse from me, and kept coming, and started shooting again; and as they shot again I ran and shot behind me. I ran into the cotton patch, and Rogers was right with me. They caught me, and Rogers fell into the ditch. I told them they ought to give the man a fair trial, and ought not take him and butcher him up. They took Rogers off, while some of them held me down and cursed me, and said if I didn't hold my mouth they would kill me. There were twelve or fifteen in the crowd. They held me three or four minutes. There were handkerchiefs over their faces. I do not know who they were. While they had me down, they shot two or three times. Sam Ball's people lived thirty-five or forty yards from there, and they heard it. I told them to get off of me, and not to do this thing. I tried to make them turn Rogers loose. They cursed me. I was saying nothing while running. Dement and Blackley were with me when we started to run. Dement stopped, and Blackley stopped in cornfield. I was in front of both of them. I had heard nothing of Rogers' friends trying to rescue him. I had no reason to believe they would."

On cross-examination, this witness testified: "I have been constable three years. I drink something, but never drank when I have business to attend to. Rogers did not have pistol while in my custody. I will not say he did not have pistol on the trial, because I had nothing to do with him after I turned him over went to the store, and I did not watch him. I did carry him to see his sweetheart on Saturday night before the trial. He was my friend. I did not handcuff him; did not tie him. I never to the justices of the peace. After turned him over to them he

tie white men. Only one man went with me and prisoner from Wilton. There were one-hundred representative men there when I left the store, and I could have deputized them to assist me. I deputized Philip White across the road. I heard it from a dozen men that Rogers was to be lynched. Two of his brothers and his friends were there. He had a heap of friends there. I went away from there across the road into a thick body of woods with but one man, and I honestly thought there was a crowd coming to mob him. Phil. White is not kin to me. I based my judgment on the information given me by Parham. Parham was drinking some. He has been in court. Did not hear Judge Graham say report as to lynching by people from Oxford was false. I knew he was to be tried that evening, and did not bring my horse because I was driving his horse to my buggy. I had sent my buggy home the evening before, but did not send Rogers' horse. Some one rode my horse up there, and I sent him home to be fed as they went into trial. After I heard report of lynching, I decided not to bring him to Oxford that night. I did not hear report until after he was committed to me. As soon as I got the *mittimus*, I carried him off. I had not formed the opinion not to carry him to Oxford when I sent my horse and buggy home. I did not say to the crowd at the trial: 'Stand back. This man is not going to jail.' I did not get hurt at the shooting, nor was any skin bruised or hurt anywhere. There are three different roads from Wilton to Oxford. Sheriff Fleming was at trial during the afternoon. Excitement was pretty high after he was found guilty. I did not believe they would find Rogers guilty. I had reason to believe that there would be trouble. I did not ask Sheriff Fleming to stay and assist me. After the trial was over, it was dark. I knew of ten or twelve buggies leaving there and coming to Oxford. I did not consult Graham, Hobgood, or any one of the justices as to how I should care for the prisoner. Four or five representative citizens from Oxford were there. I did not take Rogers to my house to spend the night. I knew my wife's condition before I took him there. I made up my mind to go by way of Franklinton and come to Oxford. When I left Wilton, Rogers' brothers and friends could have seen us if they had looked. There were thick woods there into which we went. I did not tell my wife where we were going. We were one-fourth mile

from road, and the night was quiet and still. We were in the old pine field as far as from here to the door from the path. They walked down the path, and stepped back and commenced shooting. They hit no one, though they shot twelve or fifteen times. They found me about half past nine o'clock. I did not regard this as a safe place to stay all night, but regarded it as safest place. We had just eaten supper, but had not had time to get away. I do not know how they knew where we were, unless some one watched us. My wife did not know where I was. I ran before firing a shot. I had a pistol with five loads in it. No. 38-caliber. As I ran I shot behind me. I have not seen Rogers since they took him away from me that night. I know everybody in that community. Only four of the crowd came close to me. The others did not get in ten steps of me. There were three of us and prisoner. Rogers had a pistol. I did not know he had one until he commenced firing. I did not search him that day. I heard since the trial that he had one on the trial. I was afraid he was going to be lynched, and we all talked about his going to be lynched. I reckon all those with me had guns. I did not try to hit anyone, and no one on either side got hurt, so far as I ever heard of."

On redirect examination.

"I was arrested day before yesterday in this case. I was not bound over to court. I was summoning witnesses for sheriff, and was out all night. During the trial at Wilton I was walking about and trying to keep the crowd off the lawyers and magistrates. I sent my horse home about four o'clock in the afternoon. When the justices put Rogers in my custody on Friday, they told me I could take him and go around with him to see his witnesses and his lawyers, and I could keep him with me. From the time he was arrested and placed in my custody up to the time of the trial, he was never out of my presence. I slept with him every night."

At the close of the defendant's evidence, the court informed the defendant's counsel that, if the defendant's evidence was believed, he was guilty, and the court so charged the jury. Defendant excepted; verdict of guilty; judgment, and appeal by defendant.

In this there was error. The statute, (The Code, 1022) pro-
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vides that the defendant may "show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence." The defendant swears that the escape was not with his consent, and that he acted in good faith in trying to prevent it. He testifies that he was told by a number of persons that a crowd was coming from Oxford to lynch the prisoner; it was then night, and, to avoid the lynchers, he concluded not to carry Rogers to Oxford that night, but to conceal him until morning, and for that purpose he took him into a dark wood. There was great excitement at the close of the trial, and he did not summon any of the large and excited crowd to assist him, but did summon others after he had left the place of the trial. But his principal object was to conceal him until morning. There had been several lynchings in Granville County, and he believed the report that a crowd was coming from Oxford to lynch Rogers; and when they were attacked, and Rogers taken from him by force, he thought it was the lynchers, and he begged them not to lynch him, but to let him have a fair trial.

It was suggested on the argument that what the defendant testified to was not true; that he was playing false; that it was the friends of Rogers who attacked and rescued Rogers for the purpose of liberating him, and not for the purpose of lynching him. Suppose this was so (and we do not say but what there are circumstances tending to show this to be the case); did the court have the right to pass upon this fact and say it was so? Or was it not a matter to be passed upon and found by the jury?

To sustain the judgment of the court we would have to hold that the court had the right to try the fact of good faith, of due diligence, and that he had not used due diligence, or that the defendant was in a conspiracy with the friends of Rogers to release him, and did not believe a mob was coming from Oxford to lynch him, but that story was only a sham and falsehood to cover the fraud of releasing him. This may all be so, but they were such facts as a jury must pass upon, and not the court.

It cannot be contended that if the defendant acted in good faith; that he believed the report that a crowd was coming from Oxford to lynch Rogers; that, for the purpose of preventing this, he concluded to go into hiding, and not carry Rogers to Oxford that night; and that he and those with him were set upon

by a masked, armed force, and the prisoner, Rogers, was captured and taken off, while he was held and ordered to keep quiet under threats of death,—the defendant would be guilty. And to find that this was not so would be to find that the defendant had sworn falsely. This the court had no right to find. Wherever a question of good faith, or of negligence or reasonable care, or the truth or falsity of a witness' evidence, is to be passed upon, it is a matter for the jury, and not for the court. A judge cannot even weigh the evidence. *State v. Locke*, 77 N. C. 481. Where the trial involves a question of intent, it becomes a question for the jury, and not for the court. *State v. Hopkins*, 130 N. C. 647, 40 S. E. 973. It is like finding the felonious intent in a trial for larceny. *State v. Coy*, 119 N. C. 901, 26 S. E. 120. Where a party is indicted for an assault and battery, the question of excessive force is a question for the jury, and not for the court. *State v. Goode*, 130 N. C. 651, 41 S. E. 3. In the case of *State v. Lewis*, 113 N. C. 622, 18 S. E. 69, which was an indictment for escape, the court held that, if the defendant was too sick to give the matter his personal attention, that would excuse him, if he had used *due diligence* in selecting his deputy who had the prisoner in charge, and these were questions of fact to be found by the jury. There is error. New trial.

NOTE. (By J. F. G.).—*Breach of Prison—English law—Old Newgate Prison—Its unsanitary condition in 1750, causing a fatal disease among people attending a trial at the Old Bailey—The account of it is as given by Sir Michael Foster.*

Sir Matthew Hale, says:—"At common law it was held, that if any imprisoned for a misdemeanor, tho not felony, had broke the prison and escaped, it had been felony;" but that the severity of the common law was moderated by the statute of 1. E. 2., in speaking of which he says:—"Upon this statute, therefore, to make a felony by breach of prison these things must concur: 1. The party must be in prison. 2. He must be in prison for felony. 3. He must break that prison."

"Lead us not into temptation," was the daily prayer of the people whose parliament enacted this unreasonably severe statute as a moderation of the severities of the common law, and, the same prayer continued from generation to generation during its existence; yet we discover that the prison conditions in England were such, that, the prisoners were not only under the ordinary temptation to regain liberty, but if possessing even moderate sentiments of decency, and the ordinary instincts for the self-preservation of life and health, would be moved, we may say, by uncontrollable impulse, to break from their prison dens of filth.

On pages 74 and 75 of his Crown Law, Sir Michael Foster says:—

"At the *Old Bailey* sessions in *April*, 1750, one *Mr. Clarke* was brought to his trial; and it being a case of great expectation, the court and all the passages to it were extremely crowded; the weather too was hotter than is usual at that time of the year.

"Many people, who were in court at this time, were sensibly affected with a very noisome smell; and it appeared soon afterwards, upon an inquiry ordered by the court of alderman, that the whole prison of *Newgate*, and all the passages leading thence into the court, were in a very filthy condition, and had long been so.

"What made these circumstances to be at all attended to was, that within a week, or ten days at most, after the session, many people, who were present at *Mr. Clarke's* trial, were seized with a fever of the malignant kind; and few who were seized recovered.

"The symptoms were much alike in all the patients; and in less than six weeks' time the distemper entirely ceased.

"It was remarked by some, and I mention it because the same remark hath formerly been made on a like occasion, that women were very little affected; I did not hear of more than one woman who took the fever in court, though doubtless many women were there.

"It ought to be remembered that, at the time this disaster happened, there was no sickness in the gaol more than is common in such places. This circumstance, which distinguisheth this from most of the cases of the like kind which we have heard of, suggesteth a very proper caution; *not to presume too far on the health of the gaol, barely because the gaol-fever is not among the prisoners.*

"For without doubt, if the points of cleanliness and free air have been greatly neglected, the putrid *effluvia* which the prisoners bring with them in their cloaths, &c., especially where too many are brought into a crowded court together, may have fatal effects on people who are accustomed to breathe better air; though the poor wretches, who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience from them.

"The persons of chief note who were in court at this time and died of the fever were, *Sir Samuel Pennant* Lord Mayor for that year, *Sir Thomas Abney* one of the justices of the Common Pleas, *Charles Clarke* esquire one of the barons of the Exchequer, and *Sir Daniel Lambert*, one of the alderman of *London*. Of less note, a gentleman of the bar, two or three students, one of the under-sheriffs, an officer of Lord Chief Justice *Lee* who attended his lordship in court at that time several of the jury on the *Middlesex* side, and about forty other persons whom business or curiosity had brought thither."

The Cook County Jail. In striking contrast with the Old Newgate Prison of 1750, is the Cook County Jail of today. The principal part of this jail, of which we shall first speak, was built about 1895. The outside windows are large admitting light and air freely. The corridors are wide and high without intermediate floors thereby giving light and ventilation to the successive tiers of cells. The entire interior of the jail is kept well painted. The cells are made of iron and are supplied

with running water appliances, not only for closet purposes, but to supply stationary wash bowls'. The top floor is occupied by a laundry, a debtors department, a hospital and chapel, in which the younger prisoners are given school privileges. The laundry is one of superior order; and furnished with drying ovens, the heated vapor of which is sent through the roof into the open air. The hospital is a very large room furnished with individual beds and is ventilated by windows facing the east, through which are admitted the cool breezes from Lake Michigan. The old jail, which was built immediately after the Chicago Fire, of 1871, forms the west wing, and, although inferior to the new one in point of construction, is also kept in a good sanitary condition. The prisoners are each day given three periods of exercise and recreation aggregating six hours.

During the present hot season, the writer made a professional visit to the jail, and, upon speaking of the remarkable purity of the air, was invited by the jailer, Mr. Will T. Davis, to make a tour of the entire institution. The invitation was accepted. Several matters of observation are worthy of special mention:—*The hospital was empty.* The prisoners seemed contented and social. In the main corridor of the old jail a large group of prisoners were exercising; several of them, gathered around a piano, in the east end, were having a musical entertainment of their own. In the chapel about 16 or 17 boys, apparently studious and well demeaned, were seated at desks, engaged in school work. In the old jail we passed the three ancient dungeons, only one of which retains its iron door, and it, no longer a dungeon. Mr. Davis remarked, that he did not favor that kind of punishment, for although it might temporarily enforce discipline, it was likely to engender hatred and ill will. He said, that to withdraw from a prisoner some of the jail privileges was sufficient to preserve the necessary discipline.

Mr. Davis is a model jailer. He possesses both executive ability and humane sentiments, which are appreciated by those coming under his care.

In a previous volume we took occasion to speak favorably of this institution. (12 Am. Cr. R. 84.) It was then in charge of Mr. John L. Whitman, who is now the superintendent of the Chicago House of Correction.

A woman jailer. In *Republica v. Gaoler of Philadelphia County*, 1 Yeates, 368, it appears that the return to a writ of *habeas corpus* "to bring before the court the body of Negro Robert," was made by "Mrs. Mary Weed, the gaoler." The case was heard in the Supreme Court of Pennsylvania in 1794. "Negro Robert" was discharged by virtue of the Act of 1785, for the gradual abolishment of slavery.

STATE v. KING.

114 Iowa 413—87 N. W. Rep. 282.

Decided October 1, 1901.

ESCAPE: Statute declaring it a crime to break out from the penitentiary—Escape when lawfully outside of the building.

The defendant was indicted under a statute which made it a crime for a convict to break the prison and escape. The evidence proved that the prisoner and others were working at a quarry about two miles from the penitentiary where he was committed, and that the defendant by hiding from the guards effected his escape. Held that the defendant had not violated the statute.

Appeal from District Court, Jones County; Hon. H. M. Remley, Judge.

The defendant was convicted of breaking and escaping from the State Penitentiary at Anamosa. He appealed. Reversed.

B. E. Rhinehart, for the appellant.

Charles W. Mullan, Attorney General. and Charles A. Van Vleck Assistant Attorney General, for the State.

LADD, J. The appellant, while a prisoner in the penitentiary at Anamosa for a period less than life, was taken, with about 80 other convicts, to work in the stone quarries, situated about two miles northwest of the prison proper, owned and operated by the State under the supervision of the warden. When returning from dinner, he and another dropped into a natural crevice in the rock the opening to which was thereupon covered by one of their companions. They were soon missed by the guards, and, as the quarry was watched for some time, must have remained there for nearly two days, and then removed the covering and departed. That the accused escaped from custody is conceded, but it is insisted that there was no breaking. The statute under which the indictment was returned reads: "If any person confined in a penitentiary, for any less period than for life, breaks such prison and escapes therefrom, he shall be imprisoned in such penitentiary for a term not exceeding five years, to commence from and after the expiration of the original term of his imprisonment." Section 4897, Code. It will be observed that the offense described is not a breaking and escape from prison generally. The words "such prison"

inevitably refer back to "penitentiary," and it is the breaking and escape from that prison only which is denounced by this statute. If this were not true there would have been no occasion for the enactment of the section following, relating to jail-breaking. The argument of the State, then, in so far as based on the various definitions of "prison," is not pertinent to the case. As said, these stone quarries are about two miles from the penitentiary, and nothing in this record or the statutes indicate that they are included therein as a part of it. Indeed, section 5707 of the Code, in authorizing the warden to work convicts therein, describes them as the State stone quarries near the penitentiary. Whether they might have been included need not be considered. It is enough that the statute treats them as near to, but not a part of, the penitentiary, and there is no evidence to the contrary. But if the quarries were to be regarded as a part of the particular prison described, it does not follow that there was a breaking. These men merely concealed themselves from the guard until the latter withdrew, and then walked forth from the quarries without any impediment whatever. The acts constituting the breaking of a prison are not different from those essential to be shown in establishing burglary or other criminal breaking, save, possibly, in the direction from which applied. *Randall v. State*, 53 N. J. Law, 488, 22 Atl. 46. Something must be done tending to open a way through confining walls or other obstructions to free entrance or exit. By getting in or out of the crevice, or causing the covering to be placed, or in removing it, the defendant neither broke away from nor through any obstruction whatever to his confinement in the prison. He merely eluded temporarily the personal custody of the guards, and when he stepped from the hole in the rock it was at precisely the same place he had left when entering, with no physical obstacle to his freedom removed, save in the departure of the guards. His escape was accomplished by stratagem, not by force. It is the same as though he had concealed himself under cover in his cell, or one of the corridors and the attendant, not observing him, had left the door open, and he had walked out. This would be an escape, but no one would contend that mere hiding constituted a breaking. It has long been settled that there must be some application of force,—an actual breaking, not merely constructive,—to constitute a prison breach. See *Rex v. Haswell*, Russ.

& R. 458; 11 Am. & Eng. Enc. Law, 303; *Randall v. State, supra*. Hiding within was not breaking out. Eluding the guards by stratagem was not an interference by force with the natural or artificial prison barriers to escape. As there was no breaking within the meaning of the law, the jury should have been directed to return a verdict for the defendant. Reversed.

NOTE (By J. F. G.)—*What is a prison?*—On pages 608 and 609 of his Pleas of the Crown, Sir Matthew Hale says:—

"If a man be imprisoned for felony in a prison of a franchise, and breaks and escapes, this is a breaker of prison, and it is as to this purpose the king's prison, tho the franchise or profit be the lord's 2 E. 3. 1 Coron. 140 *Stamf. P. C.* 31. a. 2 *Co. Instit.* 589."

"So at common law when sanctuary was in use, if a felon had escaped to a church, and there had been watched by the vill where the church is, and he had broken the church and escaped, this had been a felony within this statute.* *Stamf. P. C.* p. 30 b. 3 E. 3. Coron. 290.

"Whether the breach of the prison, of the ordinary by a clerk convict or attaint before purgation had been felony, *vide Stamf. P. C.* p. 31, 32 but that learning is now antequated, because by the statute of 18 Eliz. cap. 7, the prisoner is not now delivered to the ordinary; and therefore I shall not farther examine it.

"If a person be taken for felony, and put in the stocks and break it, this is a breaking of prison, and felony within the law. Dy. 99 a. 2 *Co. Inst.* 589 *Stamf. P. C.* p. 30 b.

"So it is if the constable or any other secure a felon in the house of him that makes the arrest, or in the house of any other, and he break it and escape, it is felony.

"Yet farther, if A. arrest B. for felony or suspicion of felony there being *de facto* a felony committed, and being in the hands of A. he violently rescueth himself and escapeth, this is a breach of prison, and a felony, for so are the words of my lord Coke, 2 *Instit.* 589. *Nota*. He that is in the stocks, or under lawful arrest, is said to be in prison, tho he be not *infra carceris parietes*.' And *Stamford ubi supra* p. 30 b. Et *nota* quant a ceo que chescum que est soubz arrest pour felony est prisoner auxy bien hors de gaol come deins, issint que sil soit lorsque in cippes in le haut street ou hors de cippes in le possession d'ascun, que lui aver arrest, & faite escape ceo est debrusement de prison in le prisoner, which must be intended, as it seems, of a violent escape, vis. rescuing himself out of custody."

What is a jail? In the case of *Irvington v. State*, 78 S. W. Rep. 928, decided February 10, 1904, the Court of Criminal Appeals of Texas gave the following opinion:

DAVIDSON, P. J. Appellant was convicted for breaking into jail

* Statute of 1 E. 2. which Lord Hale commented on in several previous paragraphs.

and rescuing a prisoner. The name of the prisoner was Hugh J. Russell, and he had been placed in jail for disturbing the peace. Appellant and Russell had gone to a religious meeting, where they became boisterous, and for this reason Russell was arrested and put in jail for the night. Appellant forced the door open, and released Russell. The indictment sufficiently charges the offense, and the evidence supports the conviction.

Appellant requested a charge to the effect that if the jail was not in an incorporated town, and was situated on Dr. Smith's land, and built by private subscription, the same did not belong to Wood County; therefore, if the jury believed these facts, the house broken into was not, in contemplation of law, a jail. This charge was properly refused. It was not necessary that the town should be incorporated, to constitute the structure a jail; nor was it necessary that it should be the property of Wood County, under our statute. It was used as a jail or calaboose; and when that is the case, and the prisoner is confined for a violation of the law, it is under the protection of the statute.

We find no error in the record. The judgment is affirmed.

DUFFY V. STATE.

154 Ind. 250—56 N. E. Rep. 209.

Decided February 23, 1900.

GRADES OF THE OFFENSE: *Robbery includes larceny—Evidence of robbery sustains verdict for petit larceny—Reasonable doubt as to grade—Instructions.*

1. Robbery is an aggravated form of, and includes larceny.
2. Upon an indictment for robbery, if from the evidence, the jury entertain a reasonable doubt as to robbery they should acquit as to that offense; but if from the evidence they believe beyond all reasonable doubt that the defendant is guilty of petit larceny, it is their province and right to find him guilty of that offense.
3. On an indictment for robbery, where the evidence was that of a robbery, and the defense simply that of non-participation, it was not error for the court to instruct the jury as to petit larceny; nor was it error for the jury to return a verdict of,—guilty of petit larceny.

JORDAN, J. Appellant was charged with the crime of robbery, and, on a trial before a jury was convicted of petit larceny. A motion for a new trial, which assigned as errors the giving of certain instructions, and also that the verdict was contrary to law and the evidence, was overruled. The court adjudged that the appellant be imprisoned in the State's prison for an indeterminate period of not less than one and not more than three years, and that he be fined in the sum of \$1, and disfranchised

and rendered incapable of holding any office of trust or profit for a period of one year.

The sole error assigned is the overruling of the motion for a new trial. His counsel complain of the third, ninth, and tenth instructions in the series given by the court on its own motion.

The indictment charged that appellant, at the time and place therein named, "did feloniously, violently, and forcibly make an assault upon Francis Leak, and did then and there and thereby feloniously and forcibly, with violence and putting in fear, steal, take, and carry away from the person of the said Francis Leak \$6 in money, of the value of \$6 of the property of the said Francis Leak," etc.

By the third instruction, the court, after reading to the jury the statute defining the offense of petit larceny, informed them that, under the indictment the defendant might be convicted of that crime if they were satisfied, beyond a reasonable doubt, that the property was taken by the defendant from the prosecuting witness, but was not taken by force or putting him in fear. The ninth charge in part is as follows: "If you and each of you are satisfied beyond a reasonable doubt that this defendant, at the time and place and in the manner and form charged in the indictment, did feloniously take, steal, and carry away the personal goods of the said Francis Leak of the value of not less than \$25, then it is your duty to find him guilty of petit larceny, and find his age." By the remainder of the same charge, the court advised the jury in regard to their right, in the event they found the defendant guilty of petit larceny, to assess his punishment, if they deemed it sufficient, at imprisonment in the Marion County jail or workhouse for any determinate period not exceeding one year, and that he be fined in any sum not exceeding \$500, and disfranchised and rendered incapable of holding any office of trust or profit for a determinate period. By the tenth charge, the court informed the jury that if they had a reasonable doubt of the defendant's guilt of the charge of robbery, as charged in the indictment, it was their duty to resolve that doubt in his favor, and he should be acquitted; or that, if each of them had a reasonable doubt that the defendant did feloniously steal, take, and carry away the personal goods of the said Leak, as charged in the indictment then that doubt should be resolved in his favor, and he should be acquitted.

Counsel for appellant contends that, under the evidence, i. the accused is guilty of any crime it is that of robbery, as it is asserted that the evidence conclusively shows that the prosecuting witness was robbed of his money; but it is insisted that appellant has no part in this transaction.

The principal objection urged in respect to the instruction, especially to the third and ninth, is that they are not applicable to the evidence, inasmuch as the latter establishes, as contended, that the crime perpetrated was robbery, and not larceny. It is further contended that the issue involved for the jury to determine was not as to whether the crime committed was robbery or larceny, but the question was as to whether the defendant "had anything at all" to do with the committing of the offense of robbery.

The objection urged against the instructions is wholly without merit. The third instruction, when construed along with the ninth and others embraced in the court's charge to the jury, is substantially correct. It is true the principal charge against appellant, under the indictment, of which he was convicted, is that of robbery. The offense, however, of larceny is included and involved in that charge. If the jury entertained a reasonable doubt as to the defendant's guilt of the greater offense, namely, that of robbery, as charged in the indictment, then it was in their province and duty to acquit him of that crime; but they were not required, as counsel apparently insist, to acquit him entirely; for, if they believed from the evidence, beyond a reasonable doubt, that he was guilty of the offense of petit larceny, as charged in the indictment, it was their province and right to find him guilty, as they did, of that offense. *Hickey v. State*, 23 Ind. 21; *Rains v. State*, 137 Ind. 83; *Vancleave v. State*, 150 Ind. 273; sec. 1904 Burns 1894, sec. 1835 R. S. 1881 and Horner 1897.

Robbery is said to be larceny in an aggravated form, for the reason that the goods or money are forcibly and feloniously taken from the person of the owner by violence or putting him in fear. *Bonsall v. State*, 35 Ind. 460; *Arnold v. State*, 52 Ind. 281, 21 Am. Rep. 175.

Although the indictment in the case at bar was for robbery, nevertheless, it necessarily involved the question of larceny, of which the accused was convicted. It is true, as counsel insist,

that if the jury considered the witnesses who testified upon the part of the State worthy of belief, their evidence established that the crime committed was robbery, and that appellant along with others, was guilty of committing that crime. But the jury, in their wisdom, seem to have believed that the accused was guilty of the lesser offense, and convicted him accordingly. Of this decision of the jury, appellant, under the circumstances, is in no attitude to complain.

There is no error, and the judgment is affirmed.

NOTES (By W. R. Hall) GRADES OF OFFENSES.

The most common sort of combination occurs where one crime is enclosed within the other. Take for example, a burglary; when committed by an actual larceny in the place broken, the larceny is a less offense included within the burglary. So, the perpetrator of the crime may be indicted either for the larceny or for the burglary.

The rule which seems to obtain in all cases is that the defendant is always entitled to a reasonable doubt as to the grade of the offense. *Jackson v. State*, 91 Ga. 271, 18 S. E. 298, 44 Am. Rep. 22; *State v. Anderson*, 86 Mo. 309; *Abbott v. People*, 86 N. Y. 460; *Jackson v. Commonwealth* 14 S. W. 677. And it is the duty of the court to so instruct the jury. *State v. Neis*, 68 Iowa 469, 27 N. W. 460. See also *State v. Hathaway* 100 Iowa 227. The court should always instruct the jury that if they have a reasonable doubt as to the degree of the offense they should convict of the lowest. *State v. Walters*, 45 Iowa 389.

For forms of instructions as to grades of assault see 13 Am. Crim. Rep. 98.

Where the evidence tends only to prove the greater crime it is error to allow an instruction on a lower offense. *People v. Turley*, 50 Cal. 469; *People v. Wright*, 93 Cal. 564, 29 Pac. 249; *Boyd v. State*, 17 Ga. 194; *Robinson v. State*, 84 Ga. 674, 11 S. E. 544; *State v. Tippet*, 94 Iowa 646, 63 N. W. 445; *People v. Repke*, 103 Mich. 459, 61 N. W. 861; *Same v. Furhmann* 103 Mich. 593, 61 N. W. 864; *Same v. Ezzo*, 104 Mich. 341, 62 N. W. 407; *Virgil v. State* 63 Miss. 317; *State v. Lane*, 64 Mo. 319; *Same v. Kilgore*. 70 Mo. 546; *Same v. Stoeckli*, 71 Mo. 559; *Same v. Wilson*, 88 Mo. 13; *Territory v. Gatliff*, 37 Pac. (Ok.) 809; *Gatlin v. Same*, 5 Tex. App. 531; *Winn v. State*, 5 Tex. App. 621; *Steiner v. Same*, 33 Tex. Cr. Rep. 291, 26 S. W. 214. But it is error to instruct the jury that the prisoner can only be convicted of the higher offense, when he might be convicted of the lesser offense. *Hagan v. State*, 10 Ohio St., 459. In *Regina v. Roxburgh*, 12 Cox C. C. 8, it was held that a defendant could be found guilty on his own confession of a lower offense than the indictment charges.

An indictment for an assault with intent to commit murder will warrant a conviction of a simple assault. *Knight v. State*, 70 Ind. 375, *Mooney v. Same*, 33 Ala. 419; *Bard v. Same*, 55 Ga. 319; *Wilson v. Same*,

53 Ga. 205; *State v. Shepard*, 10 Iowa 126; *State v. Jarvis* 21 Iowa 44; *Same v. Phinney*; 42 Me. 384; *Territory v. Dooley*, 4 Mont. 295; *Baker v. State*, 12 Ohio St. 214; *Bedell v. Same*, 50 Miss. 492; *State v. Coy*, 2 Aik. (Vt.) 181. But where the indictment charges an assault with intent to commit murder the verdict for a lower offense must show the whole character of the case. *People v. Cozad*, 1 Idaho 167. So an indictment for an assault with intent to commit murder will warrant a conviction of an assault and battery. *State v. Bowling* 10 Humph. (Tenn.) 52; *Foley v. State* 9 Ind. 363; *Gillespie v. Same*, Id., 380; *Clark v. Same*, 12 Ga. 350; *Wright v. People*, 33 Mich. 300; *Gardenheir v. State*, 6 Tex. 348; *Reynolds v. Same*, 11 Tex. 120; but see *Sweedon v. Same*, 19 Ark. 205, which holds that upon an indictment for an assault with intent to murder the defendant cannot be convicted of an assault and battery. So, it is generally accepted that an indictment for an assault with intent to commit murder will warrant a conviction of an assault with intent to commit manslaughter. *Jarrel v. State*, 58 Ind. 293; *State v. White* 45 Iowa 325; *Same v. Connor*, 59 Iowa 357; but this doctrine is repudiated in Illinois. See *Moore v. People*, 146 Ill. 600, where the court held that one indicted for murder could not be convicted of manslaughter. The distinction seems to be founded upon the fact that in murder there must be a specific intent in order to complete the offense. The court says further: "To reduce the felonious killing of a human being from murder to manslaughter there must be no implication of malice from facts and circumstances proven, and there must be no deliberation whatever. Where a deliberate intent must be found to exist to constitute that act criminal, it is impossible that it should be found to exist without reflection or premeditation. In this case the intent with which the assault was committed is a necessary fact to be shown or implied to constitute the offense. When it appears that there was an intent to take life, either express or implied, where the killing would not be excusable or justifiable and an assault is made with that intent, then it would be an assault with intent to commit murder. It would follow, therefore, that for one to assault another with intent to commit manslaughter would be a contradiction in terms," citing *People v. Lilley*, 43 Mich. 521.

In *State v. Thomas*, 62 N. J. L. 533, 13 Amer. Crim. Rep. 434, the Supreme Court of New Jersey held that a conviction for an assault could be had on an indictment for manslaughter. The case was appealed to the Court of Appeals of the State which conceded the general rule, but reversed the conviction because the allegations in the indictment, while good for manslaughter, did not amount to an assault. (65 N. J. L. 598; 48 Atl. Rep. 1007; 13 Amer. Crim. Rep. 432.)

An indictment for an assault with intent to commit murder will sustain a conviction of an assault with intent to kill. *State v. Nicholls* 8 Conn. 496; *Same v. Phinney*, *supra*; *Same v. Butman*, 42 N. H. 490; *Robinson v. Commonwealth*, 16 B. Mon. (Ky.) 609. So upon an indictment for a felonious assault by shooting with a pistol with intent to murder, the defendant may be convicted of an assault with felonious intent. *Commonwealth v. Lang*, 76 Mass. 11. So

on an indictment charging an assault upon a female child under the age of ten years with intent to commit rape, will warrant a conviction of a simple assault. *People v. McDonald*, 9 Mich. 130. But according to *State v. McAvoy*, 73 Iowa 557, to justify a conviction of an assault and battery under an indictment charging an assault with intent to commit rape, actual violence must be averred in the indictment. But an indictment charging an assault with intent to commit rape cannot sustain a conviction of an attempt to commit rape by fraud. *Milton v. State* 23 Tex. App. 204. But in *Regina v. Ryland*, 11 Cox C. C. 101, it was held that upon an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years old, the prisoner may be convicted of an attempt to commit that offense.

At common law a person cannot be convicted of an assault and battery on an indictment for a felonious homicide, the misdemeanor being merged in the felony. *Wright v. State*, 5 Ind. 527. But in *State v. O'Kane*, 23 Kans. 244, the court held that where a person is indicted for murder in the first degree, he may be convicted of assault and battery, provided the assault and battery is included in the charge. So on an indictment for stabbing, the jury may find a verdict for an assault and battery. *Whilden v. State*, 25 Ga. 396, 72 Am. Dec. 181. And one indicted for shooting with intent to wound can be convicted of a simple assault. *White v. State*, 13 Ohio St. 569.

So one indicted for an assault committed riotously may be found guilty of a simple assault. *Commonwealth v. Hale*, 142 Mass. 454.

Ex Parte OGLE.

Texas, Court of Criminal Appeals—61 S. W. Rep. 122.

Decided February 20, 1901.

GRAND JURY—HABEAS CORPUS: *Void indictment returned by an illegal grand jury—Prisoner discharged.*

1. The Constitution of Texas provides that a grand jury shall consist of twelve persons. Any other number does not constitute a legal grand jury.
2. The relator was tried, convicted and imprisoned on an indictment returned by a (supposed) grand jury of thirteen persons. Held,—that he was entitled to be discharged upon a writ of *habeas corpus*.

Court of Criminal Appeals of Texas.

Original writ of *habeas corpus* on behalf of S. W. Ogle, against J. S. Rice, Superintendent of the State Penitentiary. Relator discharged.

Word & Word, for the relator.

Dave Derden, B. Y. Cummings, C. F. Greenwood, County

Attorney, and *D. E. Simmons*, Acting Assistant Attorney General, for the State.

BROOKS, J. This is an original application for the writ of *habeas corpus* on the part of the relator. The record before us shows that relator was convicted on the 22d day of October, 1883, upon an indictment charging him with murder, and that the grand jury which returned the bill of indictment was composed of 13 jurors. There is an agreed statement in the record supporting this. The Constitution of this State provides that the grand jury shall consist of 12 jurors, and a grand jury composed of more or less than that number is an unconstitutional grand jury. It further appears by the record that relator is now illegally confined in the State penitentiary, under said conviction, at Huntsville, Walker County, Tex., and that J. S. Rice is superintendent of said penitentiary. It is therefore ordered and adjudged by this court that the said Rice immediately release relator from the penitentiary and from confinement, and restore him to his liberty.

STARK V. STATE.

81 Miss. 397—33 So. Rep. 175.

Decided January 5, 1903.

INDICTMENT—INSTRUCTIONS: *Defective indictment—Erroneous instruction—Unwarranted sentence.*

1. Under a statute which provides, that, "a person who willfully and lewdly exposes his person in a public place is guilty of a misdemeanor," an indictment which simply charges the act to have been done "unlawfully and willfully," is insufficient and void.
2. It was error to charge, that if the jury was satisfied beyond a reasonable doubt that the defendant willfully and lewdly exposed his person, or *did a specified act in a public place*, he should be convicted.
3. The maximum penalty prescribed by law being twenty days' imprisonment, it was error to enter a sentence of thirty days' imprisonment.

Appeal from Circuit Court, Winston County; Hon. G. Q. Hall, Judge.

James Stark, convicted of indecent exposure of the person in a public place, appeals. Reversed.

Daniel & Brantley, for the appellant.

William Williams, Assistant Attorney General, for the State.

CALHOON, J. The indictment was drawn under Code, § 1218, against the exposure of the person in a public place, etc. The statute requires the exhibition to be "willfully and lewdly" made. The indictment charges that it was "unlawfully and willfully" made, omitting the word "lewdly." If this may be left out, so may the word "willfully," by the same process of reasoning, leaving the whole charge to depend on the word "unlawfully." We hold, therefore, that the indictment is void on its face. The statute does not use the word "unlawfully." The pleader very properly did, but he failed to use a word essential to the description of the offense, so as to support the pleader's conclusion that the act was unlawful. *Cook v. State*, 72 Miss. 517, 17 South. 228; *Dee v. Same*, 68 Miss. 601, 9 South. 356; *Lewis v. Same*, 49 Miss. 354; *Harrington v. Same*, 54 Miss. 490; *Roberts v. Same*, 55 Miss. 421; and the other cases cited in Brame & A. Dig. p. 305, Secs. 93-99, and those in George, Dig. p. 814, Secs. 305-312. The exposure may be willful because sometimes inescapably necessary, and yet not at all lewd; and this is of the very essence of the offense, and therefore must be charged. *Hodnett v. State*, 66 Miss. 27, 5 South. 518.

For the same, and even stronger, reason, we think there was error in granting the only instruction asked for by the State. This charge tells the jury that, if satisfied beyond a reasonable doubt, "that the defendant willfully and lewdly exposed" his person or did a specified act in a public place, etc., they should convict. So, if he did the particular act, whether he did it unlawfully, willfully, or lewdly, or not, according to this charge, he was guilty.

Even if defendant had been properly indicted and convicted under proper instruction, the statute limits the judgment of imprisonment to 20 days, and the court was without power to sentence him for 30 days, as it did.

Reversed and remanded.

LARCENY.

Introductory review, by J. F. G.

This article is not intended as a complete discourse on the law of larceny, and its various phases, as it now exists under both American and English statutes; but as a review of common law basic principles, in the light of which modern statutes should be interpreted, together with a few suggestions as to their application, and a collection of old English cases.

Several of the subjects, which otherwise would receive attention in this article, are treated at length, in notes following principal cases reported in this volume.

Larceny at common law, is the felonious taking of the goods and chattels of another, without his consent, and with intent to deprive him of his property in the same. To constitute such crime:—

1. The thing taken must be personal property.
2. The thing taken must be of value.
3. There must be a trespass against the possession of the owner.
4. There must be an actual severing of the thing taken from the possession of the owner.
5. The taking must be without consent from the owner.
6. The taking must be from the legal possession of one who is either the absolute or a qualified owner of the thing taken.
7. The taking must be by one who has no property interest in, or legal possession of, the thing taken.
8. There must be a criminal intention which must exist at the time of the taking.

We will now proceed to enlarge upon the above proposition in the same order as stated.

1. *The thing taken must be personal property.*

So tersely is this proposition stated by Mr. East, that we quote from him the following:—

"It must be of goods personal, and not of chattels, real or such as are annexed to the freehold, unless in certain cases provided for by statute. For at common law it is merely a trespass, and not a felony to take such things; the reason of which seems to be, that things annexed to the freehold, being usually more difficult to remove, are less liable to be stolen and therefore need not be secured by such severe laws as mere personal goods require. Wherefore no larceny can be committed of trees,

grass, hedges, stones, or lead of a house, or the like. But when once they are severed from the freehold, either by the owner, or even by the thief himself, if there be an interval between his severing and taking them away, so that it cannot be considered as one continued act, it would then be felony to take them away. Thus of wood cut, grass in cocks, stones dug out of a quarry, larceny may be committed. But several exceptions to the general rule have been made by statute." (2 East Pleas of the Crown, 587.)

Applying this doctrine, it is not larceny at common law, to cut and carry away grass from another person's field, nor, to shake apples from his trees and carry them away if the severing and the carrying away be one continuous act; but if the grass be cut or apples shaken from the trees and left lying on the ground, and, the trespasser having departed returns and takes them, it is larceny, for the act of taking being separate and distinct from the act of severing it, constitutes larceny of personal property.

(*Charters, deeds and other instruments*, concerning real property, also come within the rule, that things attached to or pertaining to the realty, are not subjects of larceny).

2. *The thing taken must be of value.*

Upon this subject, Mr. East says:—

"In order to make the stealing of goods felony, they ought to have some worth in themselves, and not merely from their relations to some other thing; and therefore, bonds, bills, notes, and other securities, which concern mere choses in action, were not subjects of larceny at common law; being of no intrinsic value, and not importing any property in possession of the person from whom they are taken." (2 Easts Pleas of the Crown, 597).

3. *There must be a trespass against the possession of the owner.*

On this subject Mr. Roscoe says:—

"In order to constitute the offence of larceny, there must be an actual taking or severance of the thing from the possession of the owner, for as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he cannot be guilty of a felony in carrying them away. Still though there must be a taking in fact from the actual or constructive possession of the owner, yet it need not be by the very hand of the party accused. For, if he fraudulently procure another, who is himself innocent of any felonious intent, to take the goods for him, it will be the same as if he had taken them himself; as if one procure an infant, within the age of discretion, to steal the goods for him, or if, by fraud or perjury, he get possession, of the goods by legal process without title." (Roscoe's Criminal Evidence, 469).

On the same subject, Mr. McClain says:—

"It is one of the early and thoroughly established doctrines of the law of larceny that the act must be such as to constitute a trespass, otherwise there is not such wrongful taking as to be larceny. (*S. v. Braden*, 2 Tenn. 68; *S. v. Hite*, 9 Yerg. 197; *Robinson v. S.* 1 Coldw. 120; *Morehead v. S.*, 9. Hump. 635; *Thorne v. Turck*, 94 N. Y. 90; *Pennsylvania v.*

Campbell, Addis, 232; *Rex v. Raven*, J. Kel. 24, *Rex v. Hart*, 6 C. & P. 106; *Rex v. Smith*, 2 Den. 449; *Rex v. Webb*, 1 Moody, 431). Many more cases might be cited to the same proposition, but if they be examined the uselessness of further citations, and indeed, the uselessness of the proposition itself, becomes at once apparent. As these cases show, the general proposition is one incapable of definite application and of no value as furnishing in itself a solution of any particular case. The more definite rules which are generally derived from it, and a discussion of which is of importance, are:—First, that one who is in rightful possession of the property of another does not commit larceny by a misappropriation thereof, no matter how fraudulent and wrongful such act may be in itself; second, that there is, however, a distinction in this respect between possession and mere custody, and that a servant who has mere custody may commit larceny of the property of the master which he has within his control; third, that as there can be no trespass against one who consents to the act done, it is not larceny to obtain property from an owner by his consent, even though he is induced by false pretenses to part with the property. There are many other ramifications of the general doctrine in regard to trespass as an essential element of larceny, but these three main divisions are the controlling ones." (1 McClain on Criminal Law, Section 549).

4. *There must be an actual severing of the thing taken from the possession of the owner.*

On this proposition there have been several very close, if not erroneous decisions. In *Lapiers Case*, (given in full in the notes on pages 385, 386 and 387 in the present volume,) the facts were:—A lady wearing an ear-ring set with diamonds of the value of 150 l. was leaving an opera house at the king's door to take her carriage, when the ring was violently seized and torn from her ear; but upon her return home it was found among the curls of her hair. The court charged the jury in part as follows:—"Robbery is only an aggravated species of larceny; and to constitute larceny, it is essential that there should not only be a *taking*, but a *carrying away*. The *taking* in the present case is very clearly proved; for the ear-ring was completely separated from the ear; but it seems questionable whether there has been a sufficient *carrying away*." The jury found the defendant guilty of robbery, and, upon the case being reserved for the opinion of the judges the verdict was sustained. It may be that the audacity, rudeness, and cruel violence, together with the occasion and locality of the crime and the social standing of the victim may have had much weight with the judges. Had the ring been of nominal value, the assault made with slight violence and in an ordinary locality, and the victim an humble person, the decision might have been otherwise. It is somewhat difficult to understand, how there could have been either a taking or a carrying away of the ring; for the hair prevented the assailant from getting exclusive possession of it. The decision seems to be at variance with several other English cases, which we briefly state as follows:—, In *Cherry's case* tried at Oxford in 1781 it appeared that the prisoner in attempting to steal some linen from a wrap-

per lying lengthwise in a wagon, set the bundle upon end and cut the wrapper, but was apprehended before the linen was taken out. The indictment was for larceny of both the wrapper and the linen; but all the judges held this to be no larceny; for as Mr. East, in giving the reason of the decision says: "The felon must for the instant at least have the entire and absolute possession of them," (the goods). (2 East P. C. 556). One Elizabeth Wilkinson attempted to steal a purse, and, was detected with the purse in her hand; but the purse still hung to a string tied to keys in the owner's pocket. This was held not to be larceny. (1 Hale P. C. 508). So where one attempted to rob another whose purse was tied to a girdle the girdle broke, letting the purse fall to the ground, the assailant not getting actual possession of the purse, it was held to be no robbery. (1 Hale P. C. 533). So it was held not to be robbery, for the defendant to stop the prosecutor, who was carrying a bed, and, by a threat to shoot him, caused him to drop it, the defendant being apprehended before he got actual possession of it. (2 East P. C. 557). In speaking of a case tried before Eyre, B., Mr. East says:—"Goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter. A thief took up the goods and carried them toward the door as far as the string would permit, and was then stopped: this he held not to be a severance, and consequently no felony." (2 East P. C. 556).

5. *The taking must be without consent from the owner.*

Not only is this proposition true when applied to cases where the owner gives consent with the intention to part with the property in the goods, but even where there is no moral intention to part with the property in the goods, consent to the taking and conversion of the goods, bars a prosecution for larceny. Thus,—if the owner, for the purpose of instituting a criminal prosecution, gives consent either express or implied, personally or through a servant, agent or detective for the taking of the goods, the taking is not larceny. This doctrine applies not only to cases where the owner, agent or detective takes the initiative by suggesting the act to the supposed thief, but to cases where the latter has originally conceived the idea of a felonious taking, divulged it to others, and, was then with the consent of the owner of the property, affirmatively encouraged in carrying out his original plan. The owner upon discovering that a crime is about to be committed against his property may passively watch and wait for developments, and need not take any precautions to prevent the theft; but if, even for the purpose of prosecuting the would-be-criminal, he does an affirmative act of encouragement, he thereby, in legal contemplation gives his consent. This doctrine applies not only to larceny, but to burglary, robbery and other offences against property. For cases and notes upon the subject, see:—1 Amer. Crim. Rep. 413; 8 id. 117 & 123, 11 id. 193; 12 id. 279—302; also, Foster's Crown Law 121; East, P. C. 735; 3 Rice on Ev. 526; Clark's Criminal Law 11, and *McGee v. State* in the present volume.

6. *The taking must be from the legal possession of one who is either the absolute or qualified owner of the thing taken.*

The ownership may be absolute or qualified. Goods stolen from the possession of a bailee, may be described in the indictment, either, as the goods of the real owner, or the goods of the bailee. The latter rule, though ancient, finds a convenient place in modern practice; for where goods are stolen while in the possession of a common carrier, it would often be difficult, if not impossible, to prove actual ownership, while laying the goods in the common carrier renders the proof both reliable and easy; for, the bailee having the legal and actual possession of the goods can easily furnish satisfactory proof of such special ownership and possession. This rule is based on the fact that a bailee has the legal possession against all persons, except the real owner, and, may maintain an action, in his, or its, own name, against any other, who wrongfully takes the property from the bailee. However, the goods cannot be laid in an agent or servant, for, the agent or servant simply holds the possession of the master or employer and cannot maintain an action in his own name against a third person, for the recovery of the goods, if wrongfully taken from him. As to this latter phase of the subject, see *State v. Beatty*, present volume.

7. *The taking must be by one who has no property interest in, or legal possession of the thing taken.*

A bailee, who has lawfully received goods by a contract of bailment, has a lawful possession and a special interest to that extent, that if the goods are wrongfully taken from him by a third person, he may maintain replevin in his own name for their recovery; consequently, if during the life of the bailment, he converts the goods to his own use, such conversion is not a common law larceny, for his special interest and lawful possession, excludes the idea of a trespass against the owner. Although at common law the rule is absolute, that the bailee is not criminally liable if he converts the entire subject of the bailment, yet it has long been held by the English courts, that if the bailee breaks the package and converts part of the goods, or converts one or more of the several articles included in the same bailment, he is guilty of common law larceny. The theory for this illogical rule is, that by the breaking of the package, or by taking part of the goods the bailment is terminated, and, as the owner may immediately recover the goods, the taking is a trespass against the owner. This doctrine is *prima facie* illogical, and, does not meet with the approval of either Mr. East or Mr. Russell. (2 East, P. C. 696; 2 Russell on Crimes, 59.) The owner may at any time, whether by reason of a wrongful act or not, reclaim the goods from the bailee, unless prevented by a special contract or because of a lien for the bailee's charges; but this right to reclaim the goods is one to be exercised at the owner's discretion, and until then, the bailee's possession is lawful. If a common carrier's wrongful act, as to part of the goods, terminates the contract of bailment as to all of the goods, then in many cases the remainder, perhaps the major part of the goods, would be left distant from, and beyond the practical control of the real owner, without any legal custodian,—subject to the will of thieves and vandals. At the termination of the bailment, the ex-bailee could not either in his own name, or in that of the owner,

protect the goods against trespassers. He would no longer be a bailee, nor would the tortious ending of the bailment invest him with the authority of an agent or servant. The doctrine is faulty for another reason. As has already been noticed, the severing and conversion of things from real property is not larceny, unless there is a sufficient interval elapsing between the severing and the conversion to make them two separate and distinct acts; so, if the breaking of the package and the taking is one continuous act, the taking is that of the bailee, and hence no trespass. As will hereafter be noticed, Mr. Russell seems to think that the doctrine savors of contradiction and *has been considered as standing more upon positive law, at this time not to be questioned, than upon sound reasoning.* The doctrine may owe its origin to the peculiar facts of some case or to the effort of one or more judges to evade the doctrine, that conversion by a bailee is not larceny; but regardless of the origin of the precedent, it should have long since been abandoned. Blindly following bad precedents has been a marked weakness of courts. Erroneous decisions should not be recognized as authority, except where a departure would interfere with vested rights, or cause confusion, prejudicial to matters of property or practice.

In treating of this branch of the subject, at the above citation, Mr. East says:—

"It appears at first sight absurd to say, that if the carrier never carry the package to the place appointed, but sell the whole, it shall not be felony; but that if he take out a part of the goods only, it shall be so. Yet the distinction is well settled for the carrier is trusted with the package of it in that condition; and if the package be lost, stolen, or taken, he is answerable; and therefore his conversion is a breach of trust for which the owner may recover the value of the whole in damages. But to constitute larceny there must be an unlawful taking and trespass; and up to the moment of his parting with the whole package his possession is lawful, and he has no unlawful possession afterwards whereby to constitute a new taking, unless he break the package, or sever part of the commodity from the rest while it continues in his possession.

"It is true that Kelynge in mentioning this case of a carrier who took goods to another than the appointed place, where he opened the packs and took all the goods and converted them, which was ruled to be felony, puts the principle of the determination on a far different footing: not as it was stated in other books because the privacy of the bailment was thereby determined, but *because his subsequent act of carrying the goods to another place, and there opening and disposing of them to his own use, declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them.* There may indeed be evidence of such previous intent, sufficient to warrant such a conclusion in point of fact: and whether the particular evidence in that case were of such a nature does not appear: but if that inference may be drawn from the mere fact of the carrier's embezzling the goods, there is an end of the distinction at once as to the

case of breaking the package and taking out the goods. For if the taking of part of the goods out of the package be evidence of the carrier's having originally intended to take the goods, not upon the agreement, but with intent to steal them, *a fortiori* the taking the whole package of goods itself, whether broken or not, and converting it, must be evidence of such an intent: and so indeed Kelynge himself admits. The same reason is also adopted in the judgment on *Pear's case*: But it is quoted from Kelynge, and must stand on his authority. But all the writers, as far as I can find, have put this case upon the same footing as Lord Hale; namely that the privity of contract is determined by the act of breaking the package which makes him a trespasser; in which case the taking of the whole, or a part of the contents, makes no difference, as some have supposed."

In treating of this branch of the subject, at the above citation, Mr. Russell, says:—

"With respect, however, to a conversion of goods by a carrier, a notable distinction should be observed, namely that though if a carrier, to whom a package of goods is delivered to take to a certain place, open the package and take out part of the goods it will be a felonious taking; yet it will be no felony if he take away the whole package. (*3 Inst. 107; 1 Hale 504; 1 Hawk. P. C. c. 33, s. 2, 4.) The doctrine seems indeed to savor a little of contradiction, (See Kel. 83, where the learned reporter says, "I marvel at the case put 13 Edw. 4, 9b, that if a carrier have a tun of wine delivered to him to carry to such a place, and he never carry it, but sell it all, this is no felony; but if he draw a part of it out, above the value of twelve pence, this is felony. I do not see why the disposing of the whole should not be felony also." As to the part of this passage "above the value of twelve pence," there seems to be no reason why, if a taking to that amount would have been grand larceny, a taking to the value of twelve pence, or under, might not have been petit larceny.*), and has been considered as standing more upon positive law not at this time to be questioned, than sound reasoning. (*2 East P. C. c. 16, s. 115, p. 695.) The distinction appears to have proceeded upon the ground that the act of breaking the package is an act of trespass in the carrier, by which the privity of contract is determined; whereas, if there be no breaking of the package, no severance of part of the commodity from the rest by the carrier, but the whole of it be parted with by him in the state in which it was delivered to his hands, there will be nothing which will amount to a trespass while the package remains in his possession. And, if this be the true principle of the distinction, it does not seem to make any difference, where there is such a breaking of the package, whether the carrier take the whole or any part only of the contents. (*3 East. P. C. c. 16, s. 115, p. 697.)

"It should be mentioned, that in a book of high authority a different principle is assigned for this distinction, namely, that the subsequent act of the carrier, in opening the goods and disposing of them to his own use, "declareth that his intent originally was not to take the goods upon agreement and contract of the party, but only with the design of stealing

them." (*Kel. 82.) But it is well observed, that though such previous intent may appear from the evidence in previous cases; yet, if it were to be inferred from the mere fact of the carrier's embezzling the goods, there would be an end of the distinction itself; for if the taking of goods out of the package, be evidence of the carrier's having originally intended to take the goods, not upon agreement, but with intent to steal them, *a fortiori* the taking of the whole package of goods, whether broken or not, and converting it, must be evidence of such intent. (*2 East P. C. c. 16, s. 115, p. 696, 697.)"

(The bracket citations, marked with stars, in the above quotation from Mr. Russell do not appear in the original text, but foot notes, which we insert as a matter of convenience.)

In various jurisdictions there are statutes declaring that it is larceny for a bailee to unlawfully convert the subject of the bailment. As these statutes are enacted to supply supposed deficiencies in the common law, and, as the common law is supposed to cover cases where the bulk is broken or part of the goods taken the question arises: Do such statutes cover cases where only part of the goods are converted by the bailee, or, where the conversion is preceded by a breaking of the bulk? Doth not the mysterious wisdom of the law surpass the humble understanding of the ordinary human mind ! ! !

8. *There must be a criminal intention, which, must exist at the time of the taking.*

Distinguished from other unlawful takings and conversions of personal property,—moral turpitude, dishonesty of purpose and self-consciousness of wrong doing are predominating features in the crime of larceny,—which cannot be complete without a wicked and criminal intention to deprive the owner of his property in the thing or things taken. *Lucri causa*, i. e., a desire for self gain, is, by eminent jurists and law writers said to be an essential element to the crime of larceny; yet, there have been cases in which that feature was scarcely noticeable. Thus, in *Rex v. Cabbage Russell & Ryan*, 292, (post —) it was held by a divided court, six judges against five, that taking a horse from a stable and backing it into a coal pit, thereby killing it, was larceny, and, in *Rex v. Morfit*, Russell & Ryan, 307, (post —) it was held, also by a divided court, that it was larceny for servants of the prosecutor, who took care of his horses, to enter the granary by means of a false key, take out beans and feed them to the prosecutor's horses. In the latter case, several of the judges seemed to discover a phantom "*lucri causa*," from the fact, that feeding the beans to the master's horses lessened the work of the servants. This reasoning seems to be too visionary to be accepted as sound doctrine at th's day, especially in the United States, where the term "*servant*" is largely in disuse, and working-men's lives and liberties are not forfeited because of trivial offenses.

In treating of the term "*lucri causa*," Mr. Russell says:—

"The term *lucri causa* implies that it should be to gain some advantage to the party committing the offense; if, therefore, a person from idle, impertinent curiosity, either personal or political, opens another person's

letter, that is not larceny, even if it were done to prevent the letter from arriving at its destination. A parcel containing letters was sent by a coach of which the prisoner was the proprietor, the prisoner instead of delivering the parcel opened it, read the letters and disposed of them as he thought proper; and it was held, that this was a trespass and breach of contract, but no felony, although it was done to gratify some idle curiosity, or perhaps to prevent the letters from arriving." (2 Russ. on Crimes, page 3.)

The intention, motive or object of the accused in taking the property, alleged to have been stolen, is always material in determining whether or not the taking amounts to larceny. It first devolves on the prosecution to make out a clear case in which the taking with a criminal intention is manifested by the testimony, which if done, the defendant may explain by showing facts or circumstances, or even by unfolding the operations of his own mind, to rebut the presumption of guilt that might otherwise arise from the testimony given on behalf of the prosecution;— the final question being:—Considering all of the testimony given, both that of the prosecution and that of the defense, has it been demonstrated beyond all reasonable doubt, that the defendant unlawfully took the property *with intent to steal* the same?

An intention to steal exists, when one, well knowing that he has no ownership or interest therein, takes the personal property of another and converts it to his own use with the intention to deprive the owner of his property therein.

An intention to steal does not exist, when the taker acts under an honest belief though mistaken as to the identity of the property, or as to his ownership of it or his right to take it; nor does it exist when the object of taking is other than that of a final conversion of the property. A striking example of this last proposition is that of *Rex v. Dickinson*. (*post* —). In that case it appeared that in the night-time the defendant entered a house through an open window and took a young girl's bonnet, carrying it to his hay-mow with the intention of inducing the girl to meet him there; but not with an intention to steal the bonnet. This was held not to be larceny. As each person is presumed to know the law, a mistake as to the law, or ignorance of the law, is generally not considered an excuse for an act which otherwise would be criminal: but this rule, when applied to charges of larceny is not inflexible. An honest mistake as to the law, may, in some cases, be evidence of an absence of criminal intent, as is well illustrated by the case of *Phelps v. People*, 55 Ill. 334. It appeared in that case, that Phelps had entered into a *written* contract, by which he was to care for and feed eighty-one cattle, the property of another, and upon the final sale of the cattle he was to receive one half of the proceeds of the sale. It will be observed that here the rights of the parties were fixed by the *written* contract, and that he had no property in the cattle, but was simply to receive one half of the proceeds of the sale. Phelps drove away forty of the cattle in the night-time, sold them and reported them as lost. For this conversion, he was indicted for the statutory offense of *larceny*

by *bailee*. He was convicted; but the conviction was reversed because the trial court had refused to instruct the jury that Phelps was not guilty, if he honestly believed that he had an interest in the cattle.

It is difficult, if not impossible, to lay down any positive and inflexible rule governing the doctrine of criminal intent as applied to larceny. The doctrine is very elastic, and in exceptional cases necessarily must be expanded to apply to peculiar conditions. Thus,—It would be contrary to public policy and in violation of the rights of property to declare that workmen have the right to seize and convert the property of their employers in liquidation of unpaid wages, or, that hunger or cold under ordinary conditions will excuse the willful taking and conversion of food or fuel, even in moderate amounts; yet *extreme cases may exist* in which the taking of employers' property in liquidation of wages may, by the moral code, seem excusable, or, in which the famishing are not only excusable, but are in duty bound to sustain life by procuring either food or fuel by stealth or force. Human life is too sacred to be wantonly sacrificed at the altar of arbitrary law. Sir Michael Foster, in treating of the law of self-defense, (Foster's Crown Law 273; 13 Amer. Crim. Rep. 290) declares that when a human being is placed in a situation in which the law of organized society cannot protect him, he is relegated back to the law of nature and may protect himself; so when a human being is facing death by starvation and cold, the law of necessity triumphs over the harsh rules of organized society intended to protect, and not, to destroy mankind. These are cases peculiarly within the province of the jury to determine, and, well illustrate the soundness of the doctrine, that in criminal cases, the jurors are judges of the law as well as of the facts. In such cases, judges are loath to publicly declare to the jury any positive rule, the effect of which might tend to encourage crime; but when the jurors are permitted to construe the law favorably to the accused, a verdict of not guilty, is not accepted by the public as their conclusions as to the law, but as a finding on the facts of that particular case.

That the criminal intent must exist at the time of the taking, and, that a subsequent criminal intent will not make a previous taking larceny, is too well settled to require comment.

Verdicts for petit larceny on evidence proving grand larceny—Several very interesting cases in which juries have exercised this discretion in favor of leniency:—

In *People v. McFall*, 1 Wheeler's Criminal Cases, 108 tried in New York City in December 1822 the court instructed the jury, as follows:—*"It is for the jury to say, under all circumstances of the case, whether the prisoner is guilty of grand or petit larceny."*

In a note following a report of the case, Mr. Wheeler seems to disagree with the instruction and says:

"It is of primary importance in the administration of criminal justice that the laws be certain and defined, that as little power be left to the discretion of the court and jury, as the nature of those laws will admit. It requires no stretch of skill to discover that in proportion to the

certainty and fixed principles of law, in the same ratio will that law be respected and obeyed.

"That a jury not only decides upon the law, but also determines the fact, is a principle too well settled to be denied. It is, however, an aggregate of power too important to be trifled with. With respect to their discretion in deciding the value of goods, on a charge of larceny, whether the crime is petit or grand larceny, there can be no doubt that they are bound to those salutary rules adopted in other cases for the regulation of their judgment.

"And although a feeling of tenderness and mercy may, and should exist in the minds of virtuous jurors for the fate of a criminal, yet it should never extend to the length it has been intimated it has been extended, particularly as it relates to charges of grand larceny."

Mr. Wheeler then quotes Sir Samuel Romilly as saying:—

"The latitude which jurors allow themselves in estimating the value of property stolen, with a view to the punishment which is to be the consequence of their verdict, is an evil of very great magnitude. Nothing can be more pernicious, than that jurymen should think lightly of the important duties they are called upon to discharge, or should acquire a habit of trifling with the solemn oaths they take. And yet ever since the passing of the acts which punish with death the stealing in shops or houses, or on board ships, property of different values which are there mentioned, juries have, from motives of humanity, been in the habit of frequently finding, by their verdicts, that the things stolen were worth much less than was clearly proved to be their value. It is held, indeed, by some of the judges, (whether by all of them, and upon all occasions, I am not certain,) that juries in favor of life may fairly, in fixing the value of the property, take into their consideration the depreciation of money which has taken place since the statute passed; or, in the words of Mr. Justice Blackstone, may reduce the present nominal value of money to its ancient standard.

"In the year 1731-32, which was only thirty-two years after the act of King William, and only sixteen after the act of Queen Ann, a period during which there had scarcely been any sensible diminution in the value of money; it appears from the session's papers, that of thirty-three persons indicted at the Old Bailey, for stealing privately in shops, warehouses, or stables, goods to the value of five shillings and upwards, only one was convicted, twelve were acquitted, and twenty were only found guilty of theft; but the things stolen were found to be worth less than five shillings. Of fifty-two persons tried in the same year, at the Old Bailey, for stealing in dwelling houses, money or other property, of the value of forty shillings, only six were convicted, twenty-three were acquitted of the larceny, but saved from capital punishment by the jury stating the stolen property to be of less value than forty shillings.

"In the following years, the numbers do not differ very materially from those of the year 1731.

"Some of the causes which occurred about this time, are of such a kind,

that it is difficult to imagine by what causuistry the jury could have been reconciled to their verdict. It may be proper to mention a few of them. Elizabeth Hobbs was tried in September, 1732, for stealing in a dwelling house, one broad piece, two guineas, two half guineas, and forty shillings in money. She confessed the fact, and the jury found her guilty, but found that the money was worth only thirty-nine shillings.

"Mary Bradley, in May, 1732, was indicted for stealing in a dwelling-house, lace which she had offered to sell for twelve guineas, and for which she had refused to take eight guineas; the jury, however, who found her guilty, found the lace to be worth no more than thirty-nine shillings.

"William Sherrington, in October, 1732, was indicted for stealing privately in a shop, goods which he had actually sold for £1. 5s. and the jury found that they were worth only 4s. 10d.

"In the case of Michael Allon, indicted in February, 1733, for privately stealing in a shop forty-three dozen pairs of stockings, value £3. 10s.; it was proved that the prisoner had sold them for a guinea and a half to a witness who was produced on the trial; and yet the jury found him guilty of stealing what was only of the value of 4s. 10d.

"In another case, that of George Dawson and Joseph Hitch, also indicted in February, 1773, it appeared that the two prisoners, in company together at the same time, stole the same goods privately in a shop, and the jury found one guilty to the amount of 4s. 10d. and the other to the amount of 5s.; that is, that the same goods were at one and the same moment of different values. This monstrous proceeding is accounted for by finding that Dawson, who was capitally, had been tried before at the same sessions for a similar offense, and had been convicted of stealing to the amount only of 4s. 10d. The jury seemed to have thought, that having had the benefit of their indulgence once, he was not entitled to it a second time; or in other words, that once having a pardon at their hands, he had no further claims upon their mercy."

Mr. Wheeler then turning his attention to New York cases says:

"The following cases, among a host of others, have been selected:

"John William's case, City-Hall Rec. vol. 1, p. 5. Williams was indicted for grand larceny, for stealing a great coat and a pocket-book containing seven or eight dollars. The jury found him guilty of petit larceny.

"Thomas Smith's case, City-Hall Rec. vol. 1, p. 52. The prisoner was indicted in March term, 1816, for a grand larceny, of half a piece of Florence silk and two shawls, the property of David Ayres and Ezekiel Halsted, notwithstanding it was a flagrant case, and the property stolen of very considerable value, he was found guilty of petit larceny only.

"George Kelly's case, City-Hall Rec. vol. 3, p. 153, Kelley was indicted for grand larceny, October term, 1818, for stealing a batch of the value of forty dollars, the property of John Westcott. This was also a flagrant case; yet the jury found him guilty of petit larceny."

The conclusions of Mr. Wheeler and Sir Samuel Romilly, that jurors are subject to censure for favoring mercy in larceny cases, may well be doubted, especially when the latter writer concedes that the leniency springs "from motives of humanity."

In the earlier days of England, the efficacy of penal laws was made to depend on their severity, and all offenses were by fiction presumed to be against that high dignitary, the king, (whose hereditary office was forced upon the people as a benign act of divine grace,) and, were regarded as sins prompted by an imaginary evil influence. It was but natural, that the ordinary people viewed these laws as oppressive, and, while under the prevailing religious influences, they rested in placid obedience to the Crown, it is not surprising that when exercising their solemn duties as jurors in passing on the lives and liberties of their fellow men, they were prompted by "*motives of humanity*" and found means to mollify, or even to set at naught, the *inhuman*, cruel and unjust features of the law.

The same clergy who from the pulpits throughout England proclaimed the doctrine,—that the king ruled by "*the grace of God*," taught the doctrines of charity and forgiveness,—even though the acts of forgiveness should number "*seventy times seven*," accordingly, English jurors were loath to believe, that a king who held his authority by "*the grace of God*," required the lives of human beings, because of minor offenses, even though parliament, with his royal sanction, so declared.

Not only was it the case in England, but in this country there is a tendency to combat crime by extreme and unreasonable penal statutes, instead of by creating conditions under which crime would be less prevalent. It has frequently been the case, that some act, grossly offensive to the public, has led to illadvised spasmodic legislation, not affecting the offending party or parties; but through the strong and sweeping language used in the enactment, a law is created, that in its general application is harsh, unreasonable and unjust, and, such as neither the legislators, nor the people themselves would have favored, at the time, had not their fore-sight and judgment been blinded by sudden impulse. This particular feature, as to spasmodic legislation, may not have special application to the statutory distinction between grand and petit larceny, but so varied are the classes of property, as well as the circumstances surrounding such offenses, that unless an honest discretion, in favor of leniency, is morally reposed in the jurors, the statutory distinctions between the various grades of larceny would at times operate with unconscionable harshness.

As has been suggested, the jury, in determining the value of stolen property, may take into consideration the depreciation of the purchasing power of money since the enactment of a statute fixing the distinction between grand and petit larceny; so with equal consistency other circumstances may be considered in determining whether the case is one of grand or petit larceny. The evident intent of the legislature in fixing a limit for the crime of petit larceny, is, that a severer punishment should be inflicted when the financial injury to the owner of the property exceeds a certain amount; but which must not exceed its actual value. Thus:—The value of a coat in a clothing factory is the cost of the production, with possibly a small margin for storage, etc., which in all must be less than manufacturer's price, for he has not yet earned his profit, not having

sold it to the wholesaler: so to the *wholesaler* it is of less value than the *wholesale price*, and to the retailer it is of less value than the *retail price*, which it reaches when sold to the *consuming customer*, and then gradually declines in worth until its value is that of *old rags*. Thus the same coat, while yet in good condition, may be the subject of four distinct larcenies, and in each instance be of a different commercial value, while its intrinsic value is the same. Many other matters and circumstances may be taken into consideration by the jury in determining the value of stolen property, when that becomes material under the various statutes defining grand and petit larceny. The spirit rather than the strict letter of the statute should be considered. The New York judge, in *People v. McFall*, substantially stated the law, when he instructed the jury in the following language:—"It is for the jury to say, under all of the circumstances of the case, whether the prisoner is guilty of grand or petit larceny."

We will conclude this chapter by reproducing the following English cases:—

REX v. BINGLEY and LAW.

5 Carrington & Payne, 602.

A. was attacked by robbers, who, after using very great violence to him, took from him a piece of paper, on which was written a memorandum respecting some money that a person owed him:—Held, robbery.

Before Mr. Baron Gurney. Northern Circuit. 1833.

ROBBERY.—*The prisoners were indicted for robbing John Atkinson of "one piece of writing paper, of the value of one penny, one other piece of paper, of the value of one penny, and one written memorandum, of the value of one penny, of the goods and chattels of the said John Atkinson."*

It appeared that the prosecutor had, in the month of February, 1833, been in Pontefract Market; and that before he left Pontefract, he had given all his money into the charge of the landlord of the inn at which he had taken refreshment; so that when he left the inn to go home, he had nothing in his pockets, except a slip of paper, which contained a memorandum of the sum of money which a person owed him. On his way home, the two prisoners rushed upon him and knocked him down, and after beating him until he was disabled, they rifled his pockets and left him; when he came to himself, he missed the slip of paper, which was never found afterwards.

GURNEY, B.—If anything was taken away from the prosecutor by violence, however insignificant its value, that is sufficient to constitute robbery. In cases of robbery the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket, showed that he considered that it was of some value to himself.

Verdict—Guilty.

REX V. WILLIAM CABBAGE.

Russell & Ryan, Crown Cases. 292.

LARCENY. To make a taking felonious it is not necessary that it should be done lucri causa; taking with an intent to destroy will be sufficient to constitute this offence, if done to serve the prisoner or another person, though not in a pecuniary way.

Crown Case Reserved. Easter Term, 1815.

The prisoner was tried before Thompson C. B. at the Lent Assizes for the County of Lancaster in the year 1815, on an indictment for felonious stealing, taking, and leading away a gelding, the property of John Camplin.

The second count charged the prisoner with feloniously, unlawfully, willfully and maliciously killing, and destroying a gelding the property of said John Camplin, against the Statute, &c.

The counsel for the prosecution elected to proceed upon the first count.

It appeared that the gelding in question was missed by the prosecutor from his stables on Monday, the 28th February, 1815. The stable door, it appeared, had been forced open. The prosecutor went the same day to a coal-pit, about a mile from the stable where he saw the marks of a horse's feet. This pit had been worked out and had a fence round it. to prevent persons from falling in, one of the rails of this fence had been recently knocked off; a man was sent down into the pit, and he brought up a halter, which was proved to be the halter which belonged to the gelding. In about three weeks after the finding of the halter, the gelding was drawn up from the coal-pit in the presence of the prosecutor and who knew it to be his. The horse's forehead was very much bruised, and a bone struck out of it. It appeared that at the time that this gelding was destroyed a person by the name of Howarth was in custody, for having stolen it in August, 1813, and that the prosecutor Camplin had recovered his gelding again about five weeks after it was taken. Howarth was about to take his trial for this offense when the gelding was destroyed in the manner stated. The prisoner Cabbage was taken into custody on the 27th March, 1815; and on his apprehension he said that he went in company with Ann Howarth, (the wife of Howarth who was tried for stealing the said gelding), to Camplin's stable door, and that they together forced open the door, and brought the horse out. They then went along the road, till they came to the coal-pit before mentioned, and there they backed the horse into the pit.

It was objected by the prisoner's counsel, that the evidence in this case did not prove a larceny committed of the horse; that the taking appeared not to have been done with intention to convert it to the use of the taker, "*animo furandi et lucri causa.*"

Thomson, C. B., overruled the objection, and the prisoner was convicted upon the first count of the indictment for stealing the horse. Judgment was passed upon him, but the learned Chief Baron respited the execution to take the opinion of the judges as to the propriety of the conviction.

In Easter term, 1815, the judges met to consider this case, and the majority of the judges held the conviction right. Six of the learned judges, viz., Richards, B., Bayley, J., Chambre, J., Thomson, C. B., Gibbs, C. J., and Lord Ellenborough, held it not essential to constitute the offence of larceny, that the taking should be *lucri causa*; they thought that taking fraudulently, with an intent wholly to deprive the owner of the property sufficient; but some of the six learned judges thought that in this case the object of protecting Howarth by the destruction of the animal, might be deemed a benefit or *lucri causa*. Dallas, J., Wood, B., Graham, B., Le Blanc, J., and Heath, J., thought the conviction wrong.

(a)

(a) Vide *Rex v. Morfit*, East T. 1816, *post*, 307.

REX V. RICHARD MORFIT AND ANOTHER.

Russell & Ryan's Crown Cases. 307.

A servant clandestinely taking his master's corn, though to give it to his master's horses, is guilty of larceny.

Crown Case Reserved. Easter Term, 1816.

The prisoners were tried before Mr. Justice Abbott, at the Maidstone Lent Assizes, in the year 1816, upon an indictment for feloniously stealing two bushels of beans, value five shillings, the goods of John Wimble.

On the trial it was proved, that the prisoners were servants in husbandry to Mr. Wimble, and had the care of one of his teams; that Mr. Wimble's bailiff was in the habit of deliverng out to the prisoners at stated periods, from a granary belonging to him, and of which his bailiff kept the key, such quantity of beans as Mr. Wimble thought fit to allow for the horses of this team. The beans were to be split, and then given by the prisoners to the horses. It appeared that the granary door was opened by means of a false key procured for that purpose, which was afterwards found hid in the stable; and that about two bushels of beans were taken away on that day after an allowance had been delivered out as usual, and nearly that quantity of whole beans were found in a sack, concealed under some chaff in a chaff-bin in the stable.

The learned judges desired the jury to say whether they thought both the prisoners were concerned in taking the beans from the granary; and also whether they intended to give them to Mr. Wimble's horses. The jury answered both questions in the affirmative.

Mr. Justice Bayley had, at the same assizes directed a verdict of acquittal under circumstances of the like nature; but Abbott, J., was informed that the late Mr. Justice Heath had many times held this offence to be larceny, and that there had been several convictions before him; and also that to a question put by the grand jury at Maidstone to the late Chief Justice Baron Macdonald, he had answered that in his opinion this offence was larceny.

On account of this contrariety of opinion, the learned judge, before whom this case was tried, thought it advisable to submit the question

to all the judges, the offence being a very common one: a verdict of guilty was taken; but judgment was respited until the ensuing assizes.

In Easter term, 1816, eleven of the judges met, and considered this case. Eight of the judges held that this was felony; that the purpose to which the prisoners intended to apply the beans did not vary the case. It was, however, alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of his horses, but the men's labor was lessened, so that the "*lucri causa*," to give themselves ease, was an ingredient in the case. Graham, B., Wood, B., and Dallas, J., thought this not a felony, and that the conviction was wrong. (a)

(a) Vide *Rex v. Cabbage*, supra, 292.

REX V. JAMES LAPIER.

1 Leach's Crown Laws (4th Ed.) 320.

To force an ear-ring from the ear of a lady with a felonious intent to steal it, is a sufficient degree of violence to constitute robbery; and to remove it from the ear to the curls of her hair, a sufficient carrying away.

Crown Case Reserved.

At the Old Bailey in May Session 1784, James Lapier was indicted before Mr. Baron Perryn, for assaulting Albina Hobart, and taking from her person violently, and against her will, one gold ear-ring set with diamonds, value 150 £, the property of her husband, George Hobart, Esq.

The circumstances of this case, as they appeared in evidence, were as follows:

Mrs. Hobart was retiring from the Opera-house through the King's door, towards her carriage, which had drawn up close to the pavement of the street to receive her. Whilst she was preparing to step in, she felt a person, who was proved to be the prisoner, take hold of her ear, and pull her ear-ring as if endeavoring to pull it off. Her ear by this violence was torn entirely through; the ear-ring separated from the ear; and Mrs. Hobart conceived it had been *taken away*; but on her arrival at home, it was found amongst the curls of her hair. There was no proof that the ear-ring was ever seen in the prisoner's hand; but his hand was seen elevated to her ear, and at that instant Mrs. Hobart exclaimed, "I have lost my ear-ring."

Mr. Baron Perryn, *to the jury*. Robbery is only an aggravated species of larceny: and to constitute a larceny, it is essential that there should not only be a *taking*, but a *carrying away*. The *taking* in the present case is very clearly proved; for the ear-ring was completely separated from the ear: but it seems questionable whether there has been a sufficient *carrying away*. A number of cases have been decided upon this subject; two of them have come before LORD MANSFIELD since I have been

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upon the bench. One of them was a case reserved by Mr. JUSTICE NARES. A man got into a waggon where there was a bale of goods which lay in a horizontal posture. He raised it perpendicularly on its end, and while he was taking the contents of it out, he was detected by the waggoner.

The JUDGES were of opinion, That as the property had not been removed from the place where it at first laid, there was not a sufficient carrying away, for a carrying away in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must for the instant at least have the entire and absolute possession of them. The other case was reserved by myself.

The Uxbridge waggon was passing along Oxford street; and at a grocer's door, a parcel of sugar or other grocery was taken up and put into the waggon. The prisoner got into the waggon, and had removed the parcel from the head of the waggon, where it had been originally placed, to the tail of it; but he was apprehended before he had got it out of the waggon.

The judges held, that this was a sufficient taking and carrying away to constitute the offence. There is a very leading case upon this subject in print (1 Hale 508): A man lodged at an inn and in the morning before it was light, took the sheets from off the bed in which he lay, with an intent to steal them, and carried them into the hall, where he left them, and went to the stable to get his horse, where the hostler seized him; and it was adjudged to be larceny.

The Jury found the prisoner Guilty; but the judgment was respited, and the case submitted to the consideration of Twelve Judges.

The JUDGES were all of opinion, that it was a sufficient taking from the person to constitute robbery; for it being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it the same instant; and it was taken by violence.

In the conference on this case, Mr. BARON EYRE mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter: a thief took up the goods and carried them away towards the door as far as the string would permit, and this the JUDGES held not to be a severance, and consequently no felony, 2 East, P. C. 556. And the principle of this opinion was reconized in *Wilkinson's case*, 1 Hale, 508, where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take from him, and was detected with the purse in his hand, but the strings of his purse still hung to the owner's pocket by means of the keys, and this was ruled to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where it was before.

At the Lent Assizes for Cambridge, 16 Car. II, *Clement Simpson* was indicted on 39 Eliz. c. 15, for stealing in the dwelling-house. A Special Verdict was found, that he had taken plate out of a trunk, and laid it on the floor, but was apprehended before he had carried it away; and all the JUDGES were of opinion, That taking goods, and removing them

from one place to another in the same house, with an intent to steal them, is felony; for by the taking he hath possession. Kelynge, 31 Bro. Cor. 107. 1 Hale 358, 508. Foster, 100.

But in the case of *Edward Farrell* who was indicted for robbery, Old Bailey July Session 1787, it was found that the prisoner stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down or he would shoot him. The prosecutor laid the bed on the ground; but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended. The JUDGES: were of opinion, that the offence was not completed, and the prisoner was discharged.—So where A. had his purse tied to his girdle, and B. attempting to rob him, in the struggle the girdle broke, and the purse fell to the ground. B. not having previously taken hold of it, nor picking it up afterwards, it was ruled to be no taking. 1 Hale, 533.

REX v. HOLLOWAY.

5 Carrington & Payne, 524.

If a poacher take a gun by force from a gamekeeper, under the impression that it may be used against him it is not felony though he state afterwards that he will sell the gun, and it be not subsequently heard of.

Before M. Baron Vaughn. Aylesbury Assizes. 1833.

The prisoner was indicted for stealing a gun from the prosecutor, who was one of the gamekeepers of the manor of Beaconsfield.

The prosecutor met the prisoner and another man, whom he knew to be poachers, on a part of the manor, and seized the prisoner; his companion came up and rescued him. The prisoner on getting free, wrested the gun from the prosecutor and ran off with it. It was proved that the next day the prisoner said he should sell the gun. It was not afterwards found.

VAUGHN, B., in summing up, said that the prisoner might have imagined that the prosecutor would use the gun so as to endanger his life; and if so, his taking it under that impression would not be felony; but if he took it, intending at the time to dispose of it, it would be felony.

The jury said, that they did not think that the prisoner at the time he took the gun, had any intention of appropriating it to his use.

VAUGHN, B.—Then you must acquit him. It is a question peculiarly for your consideration. If he did not, when he took it, intend its appropriation, it is not a felony and his resolving afterwards to dispose of it would not make it such.

Verdict—Not guilty.

SILK THROSTER'S CASE.

Kelynge 35.—Old Bailey 1664.

(A workman while engaged at work in the house of his employer

upon material furnished to him by the employer, stole part of it. This was held to be larceny; for the delivery of the material to him, did not divest the owner of any interest in the goods, nor create any interest in the workman.—J. F. G.)

At the Sessions in the *Old Bailey* holden there the 12 *October* 1664, A *Silk Throster* had Men come to Work in his own House, and delivered Silk to one of them to Work, and the Workmen stole away part of it. It was agreed by *Hyde* Chief Justice myself, and Brother *Wylde* being there, that this was Felony, notwithstanding the delivery of it to the Party, for it was delivered to him only to Work, and so the entire Property remained then only in the Owner, like the Case of a *Butler*, who hath Plate delivered to him; or a *Shepherd*, who hath Sheep delivered, and they steal any of them, that is Felony at the Common Law, *Vide* 13 *Eliz.* 4. 10. & *H.* 7. 12. & 11 *H.* 7. 14. accord. *Poulton de pace* 126.

RAVEN'S CASE.

Kelyng 24.—Newgate Sessions, 14 *Charles* 2.

(At common law it was not larceny for a bailee, or one who had a special interest in goods, to convert them to his or her own use.—J. F. G.)

Mary Raven, alias Aston, was indicted for stealing two Blankets, three pair of Sheets, Three Pillowbiers, and other Goods of *William Cannon*. And upon the Evidence it appeared, that she has hired Lodgings and Furniture with them for three Months, and during that Time conveyed away the Goods which she had hired with her Lodgings, and she herself ran away at the same Time. And it was agreed by my Lord *Bridgeman*, myself, and my Brother *Wylde*, Recorder of *London*, then present, that it was no Felony, because she had a special Property in them by her Contract, and so there could be no Trespass; and there can be no Felony where there is no Trespass, as it was resolved in the Case of *Holmes*, who set fire on his own House in *London*, which was quenched before it went further. *Vide* the End of this Book, *Kelyng contra* 81.

JOYNER'S CASE.

Kelyng 29.—Newgate Sessions 1664; 16 *Charles* 2.

(Indictment for stealing a copper. The copper was attached to the freehold,—hence no larceny. The defendant was acquitted, as the indictment did not plead special matter that would sustain a verdict for the trespass. Verdict construed as an acquittal of trespass.—The report of the case is by Mr. Justice Kelyng.—J. F. G.)

At the Sessions for *Newgate*, 20 *April* 1664. 16 *Car.* 2. The Chief Justice *Hyde*, myself, and Justice *Wylde* present, One *John Joyner* was indicted for stealing a Copper, and upon the Evidence it appeared the Copper was fixed to the Freehold, and he broke it up and carried it away; And thereupon the Jury was directed by the Court, that he was not guilty, because it was no Felony. But my Lord Chief Justice *Hyde*

said, that it being so rank a Trespass the Jury might find it Specially, that he did take up the Copper, but that it was fixed, and so leave it to the Court, to judge whether Felony or no, and thereupon the Court judge it Trespass, and fine him, and give him other punishment fit for such a Trespass, as the Court did in *Holmes's Case*, *Cro. 1 Part.* 376,377. But my Brother *Wylde* and I differed in that Point, and said it was not like *Holmes's Case*; For there all the special Matter was expressed in the Indictment, viz. That *Holmes* being possessed of a House in *London*, did *Felonice* set on Fire his own House and burn it with intent to burn the Houses of other Men near adjoining, and of this the Jury found him guilty, and before Judgment, because the Court doubted whether it was Felony or no, the Record was removed into the *King's Bench*, and the Advice of all the Judges taken, and agreed, that it was no Felony; And thereupon all the special Matter being in the Indictment, and he found guilty of that as it was laid, in Law it being no Felony, he was found guilty of the Trespass, for which the Court gave Judgment against him. But in this Case he is indicted generally for stealing a Copper, which may not be fixed, and if the Jury should find him guilty generally, the Court must give Judgment as for Felony. For the special Matter that it was fixed is not laid in the Indictment. And it would be dishonourable for the Court in so plain a Case as this, to suffer the Jury to find a Special Verdict, so all agreed that the Jury should find him not guilty, which was done accordingly; *Vide 1. H. 7. 10. b.* Though Felony includes Trespass, yet if the Party indicted be discharged of the Felony, which is Principal, he is thereby acquitted of the Trespass, *tamen Quaere* of this, and *Vide* the Book.

REX v. HEDGES.

1 Leach's Crown Law (3. Ed.) 240.

What shall be considered a fixture to the freehold.

Old Bailey May Session 1779.

The prisoner was indicted for stealing six light glazed window-sashes.

The window frames from which they were taken were fixed into their proper places, but the sashes were neither hung nor beaded in the frames, but were fastened in by laths nailed across the frames to prevent their falling out.

The Court (1) held they were not fixed to the freehold.

(1) Mr. Justice Willes, Mr. Baron Hotham, Mr. Serjeant Glynn.

REX V. MARTIN.

1 Leach's Crown Law (3rd Ed.) 205.

Pulling wool from the bodies of live sheep and lambs animo furandi, is felony.

Crown Case Reserved.

At the Lent Assizes at Northampton in the year 1777, *Robert Martin* was indicted for that he "on the 5th February 1773 with force and arms, at the parish of *Southwick* in the county of *Northampton*, twenty pounds weight of wool, of the value of ten shillings, of the goods and chattels of one *James Capps*, then and there being found, feloniously did steal, take and carry away against the peace of our said Lord the King, his crown and dignity."

It appeared by the evidence, that the prisoner had pulled the wool from the bodies of sixteen lambs and lamboxes, *viz.* lambs of a year old, whilst they were living and in some places had torn the skin away with it.

The property being taken from the bodies of living animals, a doubt arose, Whether it was the subject of larceny? and the question was referred to the consideration of the Judges.

The Judges were unanimously of opinion, That it was larceny; and the principle they went upon was, that where larceny may be committed of the thing itself, it may also be committed of the produce of that thing; therefore it is no larceny at common law to gather and carry away the fruit from a tree which is growing, because, from its adherence to the freehold, it is not larceny to steal the tree itself. But it has been lately determined upon a case reserved by Mr. Justice Bathurst that larceny may be committed by taking the milk from a cow, because it would be larceny to steal the cow itself. This distinction is agreed to by most of the ancient writers upon Crown Law. *Dalton* 21 (1) *Crompton* 36. But to prevent the thoughtless and wanton frolics which might be played with these trifling kinds of property from being prosecuted as petty larcenies, when perhaps they were unmixed with any fraudulent or felonious design, the law, proceeding upon the idea *de minimis*, requires the property stolen to be of the value of *twelve pence*. The question therefore, whether felony or not, must depend on the circumstances denoting the intention; on the quantity of property taken, and on the behaviour of the party at the time; and if a wicked disposition be discovered *une disposition a faire un mal chose* as it is described by *Britton*, it may be evidence of felony, notwithstanding the trifling quality of the thing taken.

(1) Chap. 156 page 501. Edit. 1627.

REX V. RICHARD DICKINSON.

Russell & Ryan 420.

Larceny. Clandestinely taking away articles to induce the owner (a girl) to fetch them, and thereby to give the prisoner an opportunity to solicit her to commit fornication with him is not felonious.

Crown Case Reserved—Michaelmas Term 1820.

The prisoner was tried and convicted before Mr. Justice Bayley at the summer assizes for the county of Lancaster, in the year 1820, for stealing a straw bonnet, some other articles of female apparel and a box.

It appeared that the prisoner entered the house where the things were in the night, through a window which had been left open, and took the things, which belonged to a very young girl whom he had seduced, and carried them to a hay-mow of his own, where he and the girl had twice before been.

The jury thought the prisoner's object was to induce the girl to go again to the hay-mow that he might again meet her there, but that he did not mean ultimately to deprive her of them.

The learned judge doubted whether this was a felony, and discharged the prisoner upon bail, and reserved the case for the consideration of the judges.

In Michaelmas term, 1820, the judges met. They held that the taking was not felonious, and directed application to be made for a pardon.

REX v. GEORGE BRUNSWICK.

1 Moody's Crown Cases 26.

In larceny the goods of a ready furnished lodging must be described as the lodger's goods, not as the goods of the original owner.

Crown Case Reserved—Trinity Term 1824.

The prisoner was tried and convicted before Mr. Justice Bayley, (Hullock, B. being present), at the Old Bailey Sessions, June 1824, of stealing two counterpanes, two sheets, and one blanket, of Daniel Davis.

It appeared in evidence that the goods belonged to Daniel Davis, but that the use of them was let with a ready furnished room to Catherine Bath.

The learned Judge saved the point whether these goods were properly described as the goods of Daniel Davis, or whether they should have been described as the goods of Catherine Bath, as she alone, if she had kept them in her room, had the sole right to have possession of them.

In Trinity term, 1824, the Judges met and considered this case, and were of opinion that the conviction was wrong. (a)

(a) See Rex v. Belstead, Russ & Ry. C. C. R. 411.

REGINA v. JOHN POYSER.

2 Denison's Crown Cases, 233.

Lord Campbell, C. J.

Alderson B.
Platt B.

Coleridge J.
Talfourd J.

A. employed by B. a tailor, to sell clothes for him about the country, was entrusted with a parcel of clothes on the following terms:—B. fixed the price of each article, and A. was to sell each at that price, and to

bring back the money and any unsold clothes to B., and he was to have three shillings in the pound for his trouble. A. pawns some, and then fraudulently appropriates the rest. Held, that such appropriation was larceny.

Crown Cases Reserved.

The prisoner was tried before Mr. Baron Alderson, for larceny, at the Spring Assizes, A. D. 1851, for the county of *Leicester*. It appeared at the trial that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the country, and upon the following terms:—The prosecutor fixed the price of each article, and the prisoner was intrusted to sell them at that fixed price, and when he had done so he was to bring back the money and the remainder of the clothes unsold, and was to have three shillings in the pound on the moneys received for his trouble. On the 12th of *February* last he took away a parcel of clothes upon these terms, and instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit, and having so done he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, the learned Baron directed the jury, that the original bailment of the goods by the prosecutor to the prisoner was determined by his unlawful act in pawning part of them, and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use would in point of law amount to larceny. Upon this direction the prisoner was found guilty, and the question for this court was, whether this direction was right.

On the 26th of *April*, this case was argued by *O'Brien*, for the prisoner.

The contract with the prisoner was distinct and separate with regard to each article entrusted to him. The fact of his receiving all the articles at one time was a mere accident, which makes no legal difference in the case; each article had a separate price affixed to it. After he had pawned some of the articles, when was the original bailment of the others determined?

Lord Campbell.—The case states, than on the 12th of *February*, he took away a *parcel of clothes*; we must, therefore, regard the delivery of that parcel as one bailment of all the articles contained in the parcel.

O'Brien. The prisoner had authority to break the bulk; the contract imposed on him the necessity of opening it in order to take out each article, and deal with it separately.

Coleridge J.—Why may not there be a single contract embracing several particulars, as for instance, where a carrier is entrusted with various articles to leave at different places, all of which articles are placed in one bag; if he wrongfully deals with any one, is it not a breaking bulk of the whole?

O'Brien. The doctrine of breaking bulk turns on there being no authority to open the parcel, and deal with any of the articles separately from the rest.

Alderson B.—If you can make out this to be like the case of a carrier

entrusted with several parcels under several distinct contracts then certainly it is no larceny.

Lord Campbell, C. J.—I think the conviction was right. The case must be considered as though it was a single bailment. If there had been several bailments, then the wrongful dealing with one of the articles so bailed would not affect the case as to any other article. But it makes no difference, that in one parcel there were several articles. The law has resorted to some astuteness to get rid of the difficulties that might arise in the case of a wrongful dealing with one or more of several articles, all of which, when entrusted, had been contained in one bulk.

Alderson B. and Platt B. concurred.

Coleridge J.—The fact of different prices being affixed to each article makes no difference in the case.

REX VS. ISAIAH JOHN LONGSTREETH.

1 Moody's Crown Cases 137.

Getting a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, if it be taken, animo furandi, is a larceny; for the servant has no authority to part with it, but to the right person.

Crown Case Reserved—Easter Term 1825.

The prisoner was tried before Mr. Baron Garrow, at the Spring assizes for the county of Gloucester, in the year 1826, on an indictment for stealing, on the 8th day of November, 1825, three chests of tea, and a bag, the property of Samuel Tanner and his partners.

It appeared in evidence that Messrs. Tanner and Co., were carriers between London and Tewkesbury, at which latter place they have an office and warehouse. On the 8th day of November, 1825, three chests of tea, and a bag, arrived there, directed "J. Creighton, Tewkesbury." About a month before this, the prisoner, calling himself Langston, had called several times at the office, inquiring for teas, and asking if any had arrived for him. The last time he had called was about a week before the time in question, and he desired the porter of Messrs. Tanner and Co., when any came to take it to his (prisoner's) house. When the tea in question arrived, it was taken by the porter to the prisoner's house; but he was from home, and the tea was taken back to the warehouse. On the Wednesday following, the prisoner went to the porter's house, and asked him if he had any tea for him. He told him he did not know; that he had three chests marked "J. Creighton," and said he did not know whether they were for the prisoner or not, as he did not know a person by the name of Creighton. The prisoner said they were his, and that he had an invoice which specified the same; that they had spelt his name wrong by putting a C. instead of an L., but he did not produce any invoice. The carriage amounted to eighteen shillings and nine-pence, for which, and the portage, the prisoner paid one pound. The porter, by the prisoner's desire, fetched the goods and delivered them to the

prisoner at his own house. On the Saturday following, J. Creighton applied to Messrs. Tanner and Co.'s office for the goods in question; and on being informed that they had been delivered to the prisoner, he accompanied by the porter, went to the prisoner's house, which they found shut up; they then proceeded to Ledbury, to which place the prisoner had removed, and in a rug, a bed quilt, and a blanket, they found the three chests, directed as three chests of china, and the bag in a feather bed; these were all in a wagon. It further appeared in evidence, that J. Creighton had received an invoice which corresponded with the chests and bags found at Ledbury, and that his name was quite plain upon the chest found.

The jury found the prisoner guilty; and said they were of opinion that when the prisoner inquired at the wagon office for teas, he intended to obtain property not his own, and when he obtained the goods in question he knew they were not his property, and intended to steal them.

The learned Judge resided the judgment, in order that the opinion of the Judges might be taken, whether the conviction was supportable.

In Easter term, 1826, the Judges (Graham, B. Park, J. and Littledale, J. absent), met and considered this case, and held that the conviction was right, on the ground that the ownership of the goods was not parted with, the carrier's servant having no authority to part with the ownership to the prisoner, and the taking was therefore larceny. (a)

(a) *Rex vs. Jackson*, supra, p. 119. *Rex vs. Campbell*, infra.

REX V. CHARLEWOOD.

1 Leach's Crown Law, (3rd Ed.) 456.

1786.

To constitute larceny, the felonious intention must exist in the mind at the time the property was obtained; for if it be obtained by fair contract and afterwards fraudulently converted, it is no felony. If, however, a fraudulent conversion take place after the privity of contract is determined, it is felony.

Old Bailey, February Session, 1786.

George Charlewood was indicted before Mr. Justice Gould, present Mr. Baron Perryn, for feloniously stealing, on the 4th day of October 1785, a bay gelding, price five pounds, the property of *John Houseman*.

The prosecutor was a livery-house keeper in *Crown-street*, St. Ann's, Soho. On the 4th October, 1785, the prisoner, who was a post-boy, applied to him for a horse in the name of a *Mr. Eley*, saying, that there was a chaise going to *Barnet*, and that *Mr. Eley* wanted a horse to accompany the chaise, to carry a servant, and to return with the chaise. The gelding described in the indictment was accordingly delivered to him by the prosecutor's servant. The prisoner mounted the horse, and on going out of the stable-yard he met a friend of his, who asked him, where he was going? To which he replied that he was going no further than *Barnet*. He accordingly proceeded towards *Tottenham-court-road*, which leads

to *Barnet*, and also, though in some degree circuitously, to Mr. *Elcy's* house. This transaction took place about nine o'clock in the morning, and between three and four o'clock in the afternoon of the same day the prisoner sold the gelding to one *Robert Sugden*, at the *Black Horse*, in *Leman-street*, Goodman's Fields. The knees of the horse were terribly broke, one of them running blood, and the horse appeared to have been ridden very hard. The price for which the prisoner sold the horse, with the bridle and saddle included, was one guinea and a half: the purchaser almost immediately afterwards sold them to one *Johnston* for two pounds fifteen shillings.

The Court to the Jury.—The Judges, in the case of one *Pears* (1), under circumstances similar to the present, have determined that if the Jury be satisfied by the facts proved, that a person, at the time he obtains a horse, means to convert it to his own use, it is felony. But between the law of that case and the present, there is a distinction so nice, that it may seem to common understanding like splitting a hair. As this distinction, however, is adopted by the law, it is my duty to state it to you. If therefore you should think that the prisoner, at the time he came to hire the horse for the purpose of going to *Barnet*, really intended to go to *Barnet*, and proceeded, as it appears by the evidence he did, on his way to that place, it will certainly not be a felonious taking; for to constitute this species of felony, you must look to his intention at the very moment when he obtained the gelding: and therefore if he really intended to go to *Barnet*, but finding himself in possession of the horse, afterwards hatched the idea of converting it to his own use instead of proceeding to the place to which the horse was hired to go, it will not amount to a felonious taking. There is, however, another point for your consideration; for although he really went to *Barnet*, yet he was obliged by the contract to deliver the gelding to the owner upon his return to *London*; and therefore if you think that he performed the journey, and returned to *London*, and instead of delivering the gelding to the owner converted it, after such return, to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would be then over.

The Jury found the prisoner Guilty upon the first point—That at the time he hired the horse he had an intention to steal it; and this finding bringing the case precisely within the reason of the determination in the case of *The King v. Pears*, the Court thought the point too clear to save the case, and the prisoner received sentence accordingly.

(1) Ante, p. 253, Case 105.

REX V. SHARPLESS AND GREATRIX.

1 Leach's Crown Law, (3rd Ed.) 108.

If a person having ordered a tradesman to bring goods to his house, look out a certain quantity, ask the price of them, separate them from the rest, and then, by sending the tradesman home, on the pretense of wanting other articles, take the opportunity of running away with the good so looked out with intent to steal them, it is Larceny; for as the sale

was not completed, the possession of the property still remained in the tradesman.

Crown Case Reserved.

At the Old Bailey, May Session 1772, *John Sharpless* and *Samuel Greatrix* were convicted before Mr. Justice Gould, present Mr. Baron Adams, of stealing six pair of silk stockings, the property of *Owen Hudson*; but a doubt arising whether the offense was not rather a *fraud* than a *felony*, the judgment was respited, and the question referred to the consideration of the Judges upon the following case:

Case. On the 14th March 1772, *Samuel Greatrix*, in the character of servant to *John Sharpless*, left a note at the shop of Mr. *Owen Hudson*, a Hosier, in Bridge-street, Westminster, desiring that he would send an assortment of silk stockings to his master's lodgings, at the Red Lamp in Queens-square. The hosier took a variety of silk stockings according to the direction. *Greatrix* opened the door to him and introduced him into a parlor, where *Sharpless* was sitting in a dressing-gown, his hair just dressed, and *rather more powder all over his face than there was any necessity for*. Mr. *Hudson* unfolded his wares, and *Sharpless* looked out three pair of colored and three pair of white silk stockings, the price of which, Mr. *Hudson* told him was 14s. a pair. *Sharpless* then desired *Hudson* to fetch some silk pieces for breeches, and some black silk stockings with French clocks. *Hudson* hung the six pair of stockings which *Sharpless* had looked out, on the back of a chair and went home for the other goods; but no positive agreement had taken place respecting the stockings. During *Hudson's* absence *Sharpless* and *Greatrix* decamped with the six pair of stockings, which were proved to have been afterwards pawned by *Sharpless* and one *Dunbar*, an accomplice in some other transactions of the same kind, for which the prisoners were indicted.

The Judges were of opinion, that the conviction was right: for the whole of the prisoner's conduct manifested an original and preconcerted design to obtain a tortious possession of the property. The Verdict of the Jury imports, that in their belief the evil intention preceded the leaving of the goods; but independent of their verdict, there does not appear sufficient delivery to change the possession.

REGINA V. SIMON COHEN AND JOHN COLLINS.

2 Denison's Crown Cases 249.

A., bargaining with B. about some waistcoats, said, "You must go to the lowest price, as it will be ready money," B. said, "Then you shall have them for twelve shillings," to which A. assented. A. then said he should put the waistcoats into his gig, which was then standing at the door. B. replied "Very well." A. drove off with the waistcoats without paying for them and absconded for two years.

The jury returned the following verdict—"In our opinion the waistcoats were parted with conditionally, that the money was to be paid at the time, and that A. took them with a felonious intent."

Held, a larceny in A.

Crown Case Reserved.

At the General Quarter Sessions of the Peace for the county of *Durham*, held in the city of *Durham*, (before *Rowland Burdon*, Esquire, Chairman), on the 30th day of *December*, A. D. 1850, the prisoners were indicted for having, on the 10th day of *October*, A. D. 1848, stolen two waistcoats, the property of *Charles Hall Bowser*. The prisoners pleaded not guilty.

On the trial it was proved, that on the said 10th day of *October*, A. D. 1848, the prisoners, *Cohen* and *Collins*, called at the shop of the prosecutor, *Charles Hill Bowser*, who was a tailor, residing at *Chesterle-Street*, and who agreed to make each of the prisoners a suit of clothes, which had to be sent to *Newcastle*.

After giving the order, one of the two prisoners took the prosecutor to a public-house, where he gave him some liquor. After their return to the shop the prisoner *Cohen* asked the price of two waistcoats which were in the window. The prosecutor said they were fifteen shillings. *Cohen* said, "You must go to the lowest price, as it will be ready money;" the prosecutor said, "Then you shall have them for twelve shillings," which was agreed to by the prisoner (*Cohen*).

The prisoners had a gig standing at the prosecutor's shop door, and the prisoner *Cohen* said he would put the waistcoats into the gig, in which *Collins* was sitting, to which the prosecutor replied, "Very well." The evidence proved that *Cohen* had not any money, but that *Collins* had, and when *Cohen* went out to the gig, the prosecutor said he thought he went out to get the money from *Collins*. *Cohen* had, previous to this, asked the prosecutor to lend him thirty shillings.

Immediately after the waistcoats had been placed in the gig, *Cohen* got in, and they drove off full gallop. Upon inquiry next day, it was found that the prisoners had given a fictitious address. From that time,

to *December*, A. D. 1850, the prosecutor had been unable to apprehend the prisoners.

It was contended, on behalf of the defense, that there was no case to go to the jury, inasmuch as it had been proved by the prosecutor that a complete sale of the goods had taken place, and that he had voluntarily delivered them to *Cohen*.

This was overruled by the Chairman, and the jury found *Cohen* guilty of stealing the waistcoats, and *Collins* not guilty.

Cohen was discharged on bail to appear when called upon to receive the judgment of the court.

The jury, in answer to the Chairman, said, in their opinion the waistcoats were parted with conditionally, that the money was to be paid at the time, and that *Cohen* took them with felonious intent.

The question for the opinion of this Court was,—Whether the conviction of *Cohen* for larceny was proper?

On the 26th of *April*, *Huddleston*, for the prisoner, said that the only question was, whether the term "conditionally" in the verdict meant that the prosecutor parted with his property in the waistcoats on the condition

of being paid for them by the prisoner some time or other,—as if so, it would be no larceny in *Cohen*, but a purchase on credit.

Alderson B.—It means that the waistcoats were to belong to the prisoner when the prisoner complied with the condition of paying twelve shillings, and not before.

Lord Campbell C. J.—The goods were clearly taken *animo furandi*. *Collins* was in great luck to get off. This is an express finding of the jury, that the prosecutor only parted with the possession of the goods.

The rest of the Court concurred.

REX v. SARAH WILLIS.

1 Moody's Crown Cases 375.

Stealing by a wife of a member of a friendly society, money of the society deposited in a box in the husband's custody, kept locked by the stewards, is not larceny.

Crown Case Reserved—Easter Term 1833.

The prisoner, the wife of John Willis, was tried and convicted before Mr. Justice Park, at the Spring Assizes for the county of Wilts, in the year 1833, for stealing twenty-five sovereigns, ten half-sovereigns, eight half-crowns, and forty shillings, the property of William Orchard, and thirty or forty others, and amongst them the prisoner's husband; *all of whom were named in the indictment.*

This was a case of a friendly society held at the public house kept by the prisoner's husband, he being a member of the society, and the box containing the property was always left in the house of the husband of the prisoner; but the box had four locks, kept by the stewards, of whom he was not one.

The facts of the case were quite clear; the wife having broken open this box and stolen a great deal of money to pay some debts of a former husband, and the jury convicted her to the learned Judge's satisfaction as to the facts, but the learned Judge thought it right to ask the opinion of the Judges, whether a wife can be convicted of larceny, in stealing money in which her husband has a joint property, and deferred the sentence.

The learned Judge referred the Judges to 1 Hale P. C. 514, Russell on Crimes, p. 19, *Rex v. Bramley*, Russ & Ry. 478, and to the first case in the Old Bailey Sessions Papers for the January Sessions, 1818, tried before the learned Judge, in the presence of Lord Tenterden, then Mr. Justice Abbott. (a)

In Easter Term, 1833, this case was considered at a meeting of the Judges, and they were of opinion that the conviction was wrong; and the prisoner was discharged

(a) The following is the account there given of the case referred to. Richard Clark was indicted for stealing the property of Thomas Hawes. It appeared that the prosecutor's wife had assisted the prisoner in carrying off the property in question, and had cohabited with him from the

time of his absconding until his apprehension. On objection, the Court ruled that no person could be convicted of a felony alleged in stealing goods when such goods came into his possession by the delivery of the proprietor's wife.

But see *Rex v. Tolfree*, supra, 243, by which it would appear that the ruling in *Rex v. Clark* would be overruled.

KING V. HARRISON.

1 Leach's Crown Law, (3rd Ed.) 56.

A prisoner can not be found guilty of stealing goods if it appear that he could not otherwise get them than by the delivery of the prosecutor's wife.

At the Old Bailey in February Session 1756.

Nathaniel Harrison was tried before Mr. Baron Adams, present Mr. Justice Dennison and Mr. Justice Bathurst, for stealing a silver tankard, and three silver castors, the property of James Cobb.

The prisoner was an apprentice to the prosecutor. The prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up. It appeared that she had pawned some articles of it, in order to supply the prisoner with pocket money, but the articles she pawned were not those mentioned in the indictment. The prisoner confessed, that he took the articles mentioned in the indictment from the closet; and a pawnbroker proved, that he received them in pledge from the prisoner; but it did not appear by what means the prisoner had gained access to the closet from which they were taken.

The Court held, That the prosecutor's wife having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her privity or consent, it might be presumed that he had received it from her; and he was accordingly acquitted.

REX V. PETRIE.

1 Leach's Crown Law, (3rd. Ed.) 329.

A number of petty larcenies cannot be added together so as to constitute grand larceny; nor a number of grand larcenies so as to make a capital offense.

Old Bailey January Session 1784.

This was an indictment on the statute of 12 Anne c. 7 for stealing to the amount of forty shillings in a dwelling-house.

The prisoner was servant to the prosecutor, and had at different times purloined his master's property to a very considerable amount; but it did not appear that he had ever taken to the amount of *forty shillings* at any one particular time.

It was held by the Court, that property stolen must not only be in the whole of such a value as the law requires to constitute a capital offense,

but that it must be stolen to that amount at one and the same time; for the several values of different portions of property which have been stolen at different times cannot be added together for the purpose of making the offense capital, they being in fact different and independent acts of stealing. A number of petty larcenies can not be combined so as to constitute grand larceny; nor can any number of grand larcenies be added together so as to constitute a capital offense.

REX VS. THOMAS COOK.

Russell & Ryan 176.

An indictment for a common law felony must contain a "contra pacem." So must an indictment for stealing articles, the stealing of which is made felony by statutes; and in this case the laying the offense to have been against the form of the statute will not supply the defect.

Crown Case Reserved. Easter Term 1810.

The prisoner was tried and convicted before Mr. Baron Thompson at the Lancaster Lent assizes in the year 1810, upon an indictment for stealing bank notes, against the form of the statute in such case made and provided.

It was moved in arrest of judgment that the indictment was insufficient for want of charging the offense to have been committed *against the peace*. Hawkins P. C. b. 2. c. 25. s. 92. was relied upon, and also Lookup's case, 3 Burr. 1901. (b)

On behalf of the prosecution, that part of the same section in Hawkins' Pleas of the Crown was referred to where it is stated that Rastall's Precedents both of indictments of felony and of inferior offences, do as often omit the words "*contra pacem*" as make use of them. And it was further contended that the charging the offense to have been committed against the form of the statute, imported that it was also against the peace.

The learned judge respited the judgment in order that the opinion of the judges might be taken upon the question.

In Easter term, 31st of May, 1810, present all the judges, Lord Ellenborough, Mansfield, C. J. and Wood B. seemed to doubt whether "*contra pacem*" was necessary in a felony, though in a misdemeanor adjudged to be so by the cases of *Rex v. Lookup* and *Regina v. Lane*. (a)

But the rest all thought that it was necessary, and that judgment ought to be arrested, the indictment being bad for want of the words "*contra pacem*."

Judgment arrested.

(b) In which case an indictment for perjury stated the oath to have been taken and the perjury to have been committed *tempore Geo. 2.* and concluded against the peace of G. 3. On error the judges were unanimous that this was a fatal objection, and judgment reversed. See also *Rex v. Scott*, Pasch. 1820. *post*.

(a) 6 Mod. 128. Indictment for exercising a trade without a service of seven years: exception was, that it was not laid *contra pacem*; and

though Holt C. J. thought it was well enough, because laid *contra formam statuti*, yet by the three other judges, it was quashed, because every breach of the law is against the peace, and ought to be so laid.

STATE V. STEVENS.

2 Pennewill 486—49 Atl. Rep. 174.

LARCENY—LOST GOODS.

1. A simple finding and keeping of lost goods is not larceny.
2. If the finder of lost goods knows who is the owner; or if the circumstances are such that the ownership could be easily ascertained, then a fraudulent conversion by the finder, may amount to a larceny.
3. Denials of possession of lost articles by the finder; and concealment of the goods may be considered by the jury, as bearing on the question of retention at the time of the finding.

Court of General Sessions of Delaware. Kent County, April 26, 1900.

John Stevens was indicted and tried for larceny. Verdict of not guilty.

At the trial the State proved that on the evening of January 4, 1900, one John W. Ennis, while paying some money to a colored man in a store in Clayton, laid upon a safe in said store \$17 in paper money; that he had no recollection of picking said money up, and on the following morning found it was not in his pocketbook where he had been keeping the same; that there were 10 or 12 men in the store at the time, the defendant being among the number; that, owing to information which he received, he asked the defendant for the money, but was told by the latter that he did not have the same. The witness Wells, who was a clerk in the store, testified that while he and the defendant were alone in the store later, the same evening that the money was lost, he saw Stevens stoop and pick up something near the safe, putting it in his inside pocket; that he could not say what it was, but that it was green and white; that he asked Stevens whether it was a one or a five, and that Stevens said, "I don't know; I have not looked at it;" and in the course of a subsequent conversation said, "If it is Jim Saxon's, he will get it; if not, the man who gets it will have it to prove;" that the

defendant later said to witness, "Don't you go around and blab it to Jim" (meaning Mr. Saxon, the proprietor of the store). The defendant denied finding any money, and also denied having the conversation testified to by Wells.

Argued before LORE, C. J., and SPRUANCE and GRUBB, JJ.

Robert C. White, Attorney General, for the State.

William P. Shockley, for the defendant.

LORE, C. J. (charging the jury). John Stevens, the defendant, the prisoner at the bar, is charged with larceny, which is the felonious taking and carrying away of the goods and chattels of another with intent to convert the same to the taker's use without the consent of the owner. The counsel for the defendant has asked us to charge you that if the finder of lost property comes into the possession of the property lawfully, and he makes no trespass in taking the property into his possession, then the finder of lost property cannot commit larceny by the simple act of finding and taking into his possession. Clark, Cr. Law, 255, 266. That if the finder of lost property does not know who the property belongs to at the time of finding it, and takes it innocently, as a simple finder, that no subsequent change of mind and fraudulent appropriation can make him guilty of larceny. Clark, Cr. Law, 255, 256, 266, 267; *People v. Cogdell*, 1 Hill, (N. Y.) 94; *People v. Anderson*, 14 Johns. 294; *Reg. v. Preston*, 5 Cox, Cr. Cas. 390; *State v. Roper*, 3 Dev. (N. C.) 473, 24 Am. Dec. 268; *Ransom v. State*, 22 Conn. 153; *State v. Conway*, 18 Mo. 321; *Mayes v. State* (Tenn.) 4 S. W. 659; *Starck v. State*, 63 Ind. 285, 30 Am. Rep. 214; *Lane v. People*, 5 Gilman, 305. That if there were no marks upon the lost goods by which the finder could discover the owner of them, or if the finder had no knowledge of the owner of them, the finding and retention of them could not constitute the crime of larceny, and that, if the jury discovered the same from the facts in evidence, they were to acquit. That proof must be given of the genuineness of the notes. *State v. Dobson*, 3 Har. 563. That lost goods cannot be the subject of larceny. *State v. Roper*, 3 Dev. (N. C.) 473, 476; *People v. Anderson*, 14 Johns. 294, 296. That, unless the felonious intent was formed at the time of the finding, the jury are to acquit. *Starck v. State*, 63 Ind. 287, 30 Am. Rep. 214.

Gentlemen, these prayers contain in the main a correct state-

ment of the law, if the case be a simple finding. But not every one who finds and keeps goods that are lost or laid down is innocent. The general rule governing such cases is this: If the finder knows who the owner of the lost chattel is from any marks upon it, or if, from the circumstances under which it was found, the owner could have reasonably been ascertained, then the fraudulent conversion to the finder's use is sufficient evidence to justify the jury in finding a felonious intent. Should it be found, therefore, when a person picks up goods that have been laid down or lost, that he conceals them; that at the time he discloses a knowledge of the owner, and states that if they were the goods of a certain one he would give them to him, and if they were the goods of any one else they would have to prove it; if it should be found that the articles so found when asked for were not disclosed, but concealed, and that the party taking the goods is actually talking to the owner of them, and denies the possession of the goods,—we charge you that in such a case it would not be a case of ordinary finding, but you should take into consideration all such circumstances attending the finding of the goods, and say whether or not at the time of the alleged finding he intended to convert them to his own use. Such circumstances would be evidence from which you might reasonably infer felonious intent. The rule is well stated in 3 Greenl. Ev. § 159, as follows: "If the finder knows who is the owner of the lost chattel, or if, from any mark upon it, or from the circumstances under which it was found, the owner could reasonably have been ascertained, then the fraudulent conversion of it to the finder's use is sufficient evidence to justify the jury in finding the felonious intent constituting a larceny." You must determine from the evidence in this case whether this was an innocent taking of the goods,—a finding of the same, without any reasonable means of knowing the owner, and under circumstances such as would not amount to a felonious taking.

Verdict, "Not guilty."

NOTE—*Finding of lost goods*—The law according to Mr. East:—In his Pleas of the Crown, under the title: "On a Taking by Finding," Mr. East says:—

"Another defense is, that the goods were found. This is connected in a great measure with the first mentioned mode of defense. It is the most trite excuse in cases of larceny, and in general the least founded.

Still if the fact be so; as where one finds a purse in the highway, which he takes and carries away; it is no felony; although it may be attended with all those circumstances which usually prove a taking with a felonious intent; such as denying or secreting it. However, this must be understood where the finder really believes the goods to have been lost by the owner, or does not cover a felonious taking with such a pretense. Therefore where a man's goods are in such a place where ordinarily they are or may be placed, and the person takes them away with a view to convert them to his own use, the pretense of finding is no excuse. Thus the taking of another man's horse from his own, or, neighbor's ground or common, with intent to steal it, is felony. One hides a purse of money in his corn mow; his servant finding it takes part of it: if by circumstance it can appear that he knew his master laid it there, it is felony. But the circumstances must be pregnant; otherwise it may be reasonably interpreted to be a bare finding, because the purse was deposited in so unusual a place. But where a gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use; held felony: (*) for he must have known where he took up the gentleman and his trunk, and where he set him down; and therefore he ought to have restored it to him. A similar circumstance occurred again at the O. B. in 1786. The prisoner Wynne, who was a hackney coachman, had taken up Mr. Weldon the prosecutor, with several packages, at Adelphi, and set him down in Orchard Street, where the prisoner and a servant took all the things out of the coach, except one corded box, which was put under the seat, and contained several articles; for the stealing of which and the box itself the prisoner was indicted. The prisoner being then discharged, drove off; soon after which the box was missed. In a few days the prisoner was traced and taken, and the box found, in consequence of a direction from him, at a Jew's, uncorded, and part of the goods only in it; particularly several papers were missing, and among them two bonds mentioned in the indictment. The jury were of opinion under the circumstances, that the coachman uncorded the box and destroyed the papers, with an intent to embezzle the goods found in the box; and found him guilty. At the Easter Term 1786 a majority of the Judges held the conviction proper. *Austin's case* at the O. B. in 1777 was there mentioned as in point. On the other hand, evidence to show that the finder endeavored to discover the true owner, and kept the goods until it might be reasonably supposed that he could not be found; or that he made known his acquisition, so that he might make himself responsible for the value in case he should be called upon by the owner; are circumstances to rebut the implication of a felonious taking and conversion."—(2 East's Pleas of the Crown 663-665.)

(*) Mr. East, in a marginal note refers to this case, as follows: "Lamb's case, O. B. 1694, Serjt. Fofst. MS. Stealing box left in hackney coach."; from which we may infer that it was an unreported case tried before Sir Michael Foster.

STATE V. SHAW ET AL.

67 Ohio St. 157;—65 N. E. Rep. 875;—60 L. R. A. 481.

Decided November 18, 1902.

LARCENY—ANIMALS FERAE NATURAE: *Fish in net.*

1. To acquire a property right in animals *ferae naturae*, so that they may be the subject of larceny, the pursuer must bring them into his power and control, so that he may subject them to his own use at his pleasure, and must so maintain his possession and control as to indicate that he does not intend to abandon them again to the world at large; but, in cases where larceny is charged, the law does not require absolute security against the possibility of escape.
2. When fish are enclosed in a net, or in any other enclosed place which is private property, from which they may be taken at any time at the pleasure of the owner of the net or inclosure, the taking of them therefrom with felonious intent will be larceny.

(Syllabus by the court.)

Supreme Court of Ohio.

Exceptions to the Court of Common Pleas, Lake County.

Henry Shaw, John Thomas and James Fostine were indicted for grand larceny. John Thomas was tried separately. The court directed a verdict for defendant, and the State excepted. Exceptions sustained.

The indictment is as follows: "In the Court of Common Pleas of Lake County, Ohio, of the term of May, in the year of our Lord one thousand nine hundred and one. The jurors of the grand jury of the State of Ohio, within and for the body of the County of Lake, duly impaneled, sworn, and charged to inquire of crimes and offenses committed within the said County of Lake, in the name and by the authority of the State of Ohio, upon their oaths do find and present, that Henry Shaw, John Thomas, and James Fostine, late of said county, on the fifteenth day of May in the year of our Lord one thousand nine hundred and one, with force and arms, in said County of Lake and State of Ohio, unlawfully and feloniously did steal, take, and carry away seven hundred and thirty pounds of fish, of the value of forty-one dollars, of the personal property of Morris E. Grow and John Hough, partners as Grow and Hough, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio." One of the defend-

ants, John Thomas, was tried separately. On the trial, no evidence was offered by the defendant. The evidence offered by the State disclosed that on the morning of May 15, 1901, about 5 or 6 o'clock, a small sailboat was discovered two or three miles off Fairport Harbor; a tug ran out and overhauled this boat, and discovered they had fish on board. In reply to an inquiry where they had got the fish, they said near Cleveland, out of a trap net. They were asked to come to the harbor with the tug, and refused; two other tugs came to the assistance of the one already there, and brought in the defendants, with their boat, and they were arrested. It is in evidence that, on the way in, the defendant John Thomas said that "they lifted two pound nets west of the pier and got the fish." The testimony further tended to show that the two pound nets belonged to Grow & Hough, the parties named in the indictment, and that the defendants had taken from these two nets somewhere from 100 to 150 pounds of fish each. It also appears that the construction of these pound nets is such that the entrance to the net was about 35 feet deep, 8 rods long, and terminated in an aperture leading into the net, which was 2 feet 10 inches in diameter. This tunnel, as it is called, extended into the net, or pot, some 5 or 6 feet, and the pot was about 28 feet square, reaching, perhaps, 4 feet above the water. The evidence shows that the opening of the tunnel into the pot was the place where the fish entered, and that it was at all times left open. There is no evidence as to the quantity of fish escaping from the nets; it simply appears that it was possible for the fish to go out in the same way they got in. It was also in evidence that these nets were frequently disturbed by wind and storm, and at such times so disordered that fish escaped over the top. When the state had rested its case, the defendant Thomas moved the court to arrest the testimony from the jury and direct a verdict of not guilty. The court overruled this motion, but after argument did direct a verdict of not guilty, which was returned by the jury, and to which the state excepted.

J. M. Sheets, Attorney General, *Harry P. Bosworth*, and *Homer Harper*, for plaintiff.

A. G. Reynolds and *Foran. McTigue & Baker*, for defendants.

DAVIS, J. (after stating the facts). Fish are *ferae naturae*;

yet, "where the animals or other creatures are not domestic, but are *ferae naturae*, larceny may notwithstanding be committed of them, if they are fit for food of man, and dead, reclaimed (and known to be so), or confined. Thus * * * fish in a tank or net, or, as it seems, in any other inclosed place which is private property, and where they may be taken at any time at the pleasure of the owner, * * * the taking of them with felonious intent will be larceny." 2 Russ. Cr. 83. "Fish confined in a tank or net are sufficiently secured." 2 Bish. Cr. Law, § 775.

The trial judge seems to have directed the jury to return a verdict of "not guilty" on the theory that the fish must have been confined so that there was absolutely no possibility of escape. We think that this doctrine is both unnecessarily technical and erroneous. For example, bees in a hive may be the subject of larceny, yet it is possible for the bees to leave the hive by the same place at which they entered. To acquire a property right in animals *ferae naturae*, the pursuer must bring them into his power and control, and so maintain his control as to show that he does not intend to abandon them again to the world at large. When he has confined them within his own private inclosure, where he may subject them to his own use at his pleasure, and maintains reasonable precautions to prevent escape, they are so impressed with his proprietorship that a felonious taking of them from his inclosure, whether trap, cage, park, net, or whatever it may be, will be larceny. For such cases, as is clearly shown by the authorities above quoted, the law does not require absolute security against the possibility of escape, and none of the authorities cited for the defendants in error, except *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573, sustain their contention. *Young v. Hichens*, 6 A. & E., N. S. 606, 51 E. C. L. 506, is not applicable to this case. That was an action for the conversion of fish which were never in the plaintiff's net, but had been frightened away from entering into the plaintiff's net by the defendant, and caught in his own net.

In the present case the fish were not at large in Lake Erie. They were confined in nets, from which it was not absolutely impossible for them to escape, yet it was practically so impossible; for it seems that under ordinary circumstances few, if any, of the fish escape. The fish that were taken had not escaped, and it does not appear that they would have escaped, or even that they

probably would have escaped. They were so safely secured that the owners of the nets could have taken them out of the water at will as readily as the defendants did. The possession of the owners of the nets was so complete and certain that the defendants went to the nets and raised them with absolute assurance that they could get the fish that were in them. We think, therefore, that the owners of the nets, having captured and confined the fish, had acquired such a property in them that the taking of them was larceny.

Exceptions sustained.

BURKET, C. J., and SPEAR, SHAUCK, PRICE, and CREW, JJ., concur.

NOTE (By J. F. G.)—*Larceny—Animals ferae naturae*: On this subject, in his Pleas of the Crown, Mr. East says:

"It is however certain, that larceny cannot be committed of such animals in which there is no property, as of beasts that are *ferae naturae* and unreclaimed; such as deers, hares, and conies in a forest, chase or warren; fish in an open river or pond; old pigeons out of the house; or wild fowls at their natural liberty; although any person may have an exclusive right *ratione loci aut privilegii* to take them if he can in those places. But if they are dead, reclaimed, and known to be so, or confined and may serve for food, it is otherwise even at common law. For of deer so enclosed in a park, which may be taken at pleasure; fish in a trunk or net, or as it should seem in any other inclosed place which is private property, and where they may be taken at the pleasure of the owner at any time; pheasants or partridges in a mew; young pigeons, or old ones, when shut up; young hawks in a nest, and even old ones, when reclaimed and known by the party to be so; larceny may be committed. The same as to peacocks; so of swans marked and pinioned, or swans unmarked, if tame, kept in a mote, pond, or private river: but if they range out of the royalty, it is no felony to take them though marked, because it cannot be known that they belong to any person. Nor can larceny be committed of the eggs of these, or of hawks; because the stat. 11 H. 7. c. 17. has appointed a less punishment, namely, fine and imprisonment. But the stealing a stock of bees seems to be admitted to be a felony.

"John Rough being convicted on an indictment for stealing a pheasant value 40s. of the goods and chattels of H. S.; all the judges on a second conference in Easter term 1779, after much debate and difference of opinion, agreed that the conviction was bad; for in cases of larceny of animals *ferae naturae*, the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add of the goods and chattels of such an one."—(2 East's Pleas of the Crown 607.)

Again Mr. East says:—"But there are some animals which, though they

may be reclaimed, yet are considered of so base a nature that no larceny can be committed of them; such as bears, foxes, monkeys, cats, ferrets and the like. And the same rule applied to dogs; but now by stat. 10 Geo. 3. c. 18. the stealing of dogs is made punishable upon conviction before two justices."

"Of domestic animals, such as sheep, oxen, horses, and the like, or of domestic creatures which are fit for food, as hens, ducks, geese, turkeys, peacocks, &c.; and also of their eggs, larceny may be committed. Concerning some of these particular provision has been made by statute." (2 East's Pleas of the Crown 614.)

REX v. JOHN SEARING.

Russell & Ryan 350.

Ferrets, though tame and saleable, cannot be the subject of larceny.

Crown Case Reserved—Easter Term 1818.

The prisoner was tried before Mr. Baron Wood, at the Lent assizes for Hertfordshire, in the year 1818, for larceny, in stealing "five live tame ferrets confined in a certain hutch," of the price of fifteen shillings, the property of Daniel Flower.

The jury found the prisoner guilty; but on the authority of 2 East, P. C. 614, where it is said that ferrets (among other things) are considered of so base a nature that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be taken thereon.

It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoners for nine shillings.

In Easter term, 1818, the judges met and considered this case; they were of opinion that ferrets (though tame and saleable) could not be the subject of larceny, and that the judgment ought to be arrested. (a)

(a) See 1 Hale P. C. 512. 1 Hawk. c. 33. s. 23. 6th edit. 3 Inst. 102.

REGINA v. WILLIAM CHEAFOR.

2 Denison's Crown Cases, 361.—5 Cox Criminal Cases 367.

The prisoner was indicted for stealing four tame pigeons, the property of J. M.:

Held, that he was properly convicted of larceny; tame, i. e. reclaimed pigeons, although unconfined, with free access, at their pleasure to the open air, being as much the subject of larceny as domestic fowl, which are allowed to go at large.

Crown Case Reserved—November 22, 1851.

At the Quarter Sessions for the county of Nottingham, held at East Retford, on the 7th day of July, A. D. 1851, William Cheafor, was indicted for feloniously stealing four tame pigeons, the property of John Mansell. The pigeons at the time they were taken by the prisoner, were

in the prosecutor's dovecote, over a stable, on his premises, being an ordinary dovecote, and having holes at the top for the ingress and egress of the pigeons, and having a door in the floor which was kept locked. The prisoner entered the dovecote at twelve o'clock at night, breaking open the door and taking away the pigeons. The prisoner's Counsel contended, that the pigeons being at liberty at any time to go in and out of the dovecote, and therefore not reclaimed, and in a state of confinement, were not the subject of larceny. The Chairman directed the jury, that in his opinion the view contended for by the prisoner's Counsel was correct, and that the pigeons were not properly the subject of larceny. The jury found the prisoner guilty; but judgment was postponed in order to ask the opinion of the Judges, as to whether the Chairman's direction to the jury was right, and whether the prisoner, under the facts stated, was properly convicted.

On the 22d day of November, A. D. 1851, this case was considered by the Judges, when the following judgment was pronounced by Lord Campbell C. J.:—In the indictment the pigeons are alleged to be tame, that is reclaimed, and I think the jury have taken the correct view of the law. We think that the direction of the Court was wrong; because it really comes to this, can larceny be committed of tame pigeons? Pigeons must have the means of ingress and egress to the open air, and if the direction of the Chairman be law, no larceny could be committed of chickens, ducks and geese, which are all allowed to go at large. Mr. Greaves, in his note on Luke's case, 2 Russell on Crimes, 83, says, that that case was determined on the ground that the pigeons were tame and reclaimed, and not that they were shut up in boxes at the time they were taken. It had been supposed that Parke B., had in a former case, decided that there could be no larceny of pigeons, unless they were shut up in a house or box; but Parke B., had, in fact, not so decided. We all think that the tame pigeons may be the subject of larceny, although they have an opportunity of getting out and enjoying themselves in the open air.

(Foot notes omitted—J. F. G.)

COMMONWEALTH V. THOMAS CHACE.

26 Mass., (9 Pick) 15.

Decided October 23, 1829.

Doves are animals ferae naturae, and cannot be the subject of larceny, unless when they are in the custody of the owner; As for example, in a dove-house.

The defendant was indicted for stealing fourteen tame doves, the property of Benjamin Williams. At the trial before Morton J., it was proved, that Williams had dove-houses in which he reared doves and that he used them for food; that the doves mentioned in the indictment occupied these dove-houses, and were claimed by Williams as his property; that he took care of them and fed them regularly, and that they would come to be fed when called. The evidence also tended to show, that the

defendant shot the doves and used them for food, and that he did it *animo furandi*.

The judge instructed the jury, that if they believed the evidence, and that the doves were taken by the defendant with a felonious intent, they ought to find him guilty.

The defendant's counsel excepted to this instruction, on the ground that doves could not be the subject of larceny. The jury having found the defendant guilty, a motion was made for a new trial.

Russell, for the defendant, cited *Wallis v. Mease*, 3 Binney, 546; East's P. C. tit. Larceny; Russell on Crimes, tit. Larceny. Oct. 21st.

Morton, Attorney General, *contra*, cited 4 Bl. Comm. 236; 3 Davis Abr. 25, 158, 161.

Parker C. J. delivered the opinion of the Court. It was held in all the authorities, that doves are *ferae naturae*, and as such are not subjects of Larceny, except when in the care and custody of the owner; as when in a dovecot or pigeon-house, or when in the nest before they are able to fly. If, when thus under the care of the owner, they are taken furtively, it is larceny. The reason of this principle is, that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps when feeding on the grounds of the proprietor, or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food, and they are caught or killed, or carried away from the enclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence the act of killing them, though for the purpose of using them for food, is not felonious.

Therefore a new trial is granted.

STATE v. REPP.

104 Iowa 305—73 N. E. Rep. 829—40 L. R. A. 503.

Decided January 18, 1898.

Stevens discovered a bee tree on the land of Cody; cut down the tree and put the bees in a gum procured from Mosely; which gum had been cut from a tree on defendant's land, without his knowledge or consent; finding the gum and bees, where Stevens had left them, defendant removed the gum and bees at dusk in the evening to his mother's orchard, and inclosed them in a telescope gum about thirty-three inches square and nailed to that procured from Mosely.—Held:—that the bees in the first instance were procured by a trespass on part of Stevens; and, that the taking by the defendant was not larceny.

Appeal from District Court, Monroe County. Hon. Frank W. Eichberger, Judge.

Victor Repp, convicted of larceny, appeals. Reversed.

T. B. Perry, for the appellant. Milton Remley, Attorney General, and Jessie A. Miller, for the State.

LADD, J.—In July, 1895, Stevens found a bee tree on the land of Cody, and, without the latter's permission, chopped it down, and put the bees in a gum obtained from Mosely. These were left near the fallen tree, on Cody's land. The gum was cut from a tree on defendant's land, without his knowledge or consent, and finding it, with the bees, where left by Stevens, he removed them, at dusk of day, to the orchard of his mother, and inclosed them in a telescope gum, about thirty-tree inches square, nailed to that procured from Mosely. This was unknown to the mother, whose residence was about one mile from the bee tree, while that of the defendant was three miles further away. It does not appear that the defendant knew who hived the bees, or that Stevens was aware that Mosely was not the owner of the gum. When Stevens discovered the bees, after several days' search, the defendant refused to do more than return them and after some parley this prosecution was begun.

Wild game is under the control of the State and only becomes the subject of private ownership when reclaimed by the art and industry of man. A somewhat different rule applies to bees, though *ferae naturae*. These have a local habitation. Blackstone states:

"It hath also been said that with us the only ownership in bees is *ratione soli*; and the charter of the forest, which allowed every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found." The same rule is laid down in Cooley on Torts, 435 where it is said that bees, "have a local habitation, more often in a tree than elsewhere, and while there may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and therefore, such property as the wild bees are susceptible of is in him, also." And it has been so adjudged in *Ferguson v. Miller*, 13 Am. Dec. 519, and *Rexroth v. Coon*, 15 R. I. 35 (23 Atl. Rep. 37) (2 Am. state Rep. 863). By the law of nature the person who hived the swarm would be entitled to it, but, under the regulation of property rights, since the institution of civil society, the forest, as well as the cultivated field, belongs to the owner thereof, and he who invades it is a trespasser. *Goff v. Kilts*, 15 Wend. 550. See *Adams v. Burton*, 43 Vt. 36. The mere finding of bees on the land of Cody gave Stevens no right to them, or to the tree. *Merrills v. Goodwin* 1 Root, 209; *Gillet v. Mason*, 7 Johns. 16. In cutting down the tree he was a wrongdoer. Had he acted with the license of Cody, he might have acquired ownership, but he could obtain no title by his wrongful acts as a mere trespasser. *Rexroth v. Coon*, Supra. In that case the plaintiff had placed a box in the crotch of the tree belonging to Green,

without permission, and later the defendant, without the consent of either, took the box from the tree, emptied it of bees and honey, and then replaced it. In holding that the plaintiff was not entitled to recover, the court said: "The plaintiff was a trespasser upon the land of Green. He had no right to place the box or hive in the tree, and by placing it there he acquired no title to the bees which subsequently occupied it or to the honey which they produced." No better title could be acquired by removing the bees from a tree-top to a box on the land, than by luring them to a box placed in a tree-top. Title to a thing *ferae naturae* cannot be created by the act of one who at the moment is a trespasser, and Stevens obtained no interest in the bees by the mere wrongful transfer from the tree to the gum. He neither owned the land on which he left them, nor the gum in which they were hived. Having neither title nor possession, he had no interest therein, the subject of larceny. As the information alleged ownership in Stevens, and the case was tried on that theory, we need make no inquiry as to any taking from Cody. But see *Wallis v. Mease*, 3 Bin. 546.—Reversed.

McGEE v. STATE.

Texas, Court of Criminal Appeals—66 S. W. Rep. 562.

Decided January 29, 1902.

LARCENY—ENTRAPMENT: *Implied consent of owner through a detective, to the taking of property, as a basis for a criminal prosecution—Improper testimony—Instructions.*

1. A witness for the prosecution, who, on cross-examination admitted, that he acted in the capacity of a saloon keeper and detective, was permitted to state that he came to the town in such double capacity at the request of certain persons, to ferret out thefts in the community. Held,—error.
2. A witness for the State, who, on cross-examination admitted that he acted in the double capacity of saloon keeper and detective, was permitted to state that he came to the town at the request of certain persons, and at their suggestion, went into the business that he might become acquainted with the defendant and another person, to detect them and others engaged in stealing. Held,—that this testimony was improper; was of the nature of hearsay; and, suggested that the community suspected the defendant of being engaged in criminal practices; and, also held that the error was not cured by an instruction to the jury, limiting the testimony to the capacity in which the witness acted.
3. The taking of personal property at the suggestion or in co-operation with a detective who with the express or implied, consent of the owner is endeavoring to entrap the taker, is not larceny.
4. The appellant claimed, that a detective induced him to join in a scheme

to take certain cattle, in order to entrap and prosecute other persons. If the accused so acted under a reasonable belief that the detective had the consent of the owner, either express or implied, such taking would not be larceny.

5. In a case where the evidence raises the question of entrapment, the court should early instruct the jury as to the law applicable to such evidence; and when the evidence suggests implied consent on part of the owner of alleged stolen property, such feature should be covered in the instructions.

Appeal from District Court, Johnson County; Hon. W. Poin-dexter, Judge.

John McGee, convicted of theft, appeals. Reversed.

S. C. Padelford and *Ramsey & Odell*, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at confinement in the penitentiary for a term of three years.

According to the state's theory, the theft of the cattle of Hunnicutt, the owner, was committed by appellant and one Mercer, in company with one Jack Hubbard, who acted as a detective, in order to entrap and convict McGee and Mercer. According to the State's contention the theft of the cattle was suggested and brought about by appellant and Mercer; that Hubbard engaged in it at their instance, and merely to detect them in the commission of the offense; that Hunnicutt, the owner of the cattle, did not consent for Hubbard, who informed him of the proposed theft, to take the cattle, but merely said, "they had better let my cattle alone, but, if they come to get my cattle, go ahead and catch them." Appellant's theory was to the effect that he engaged in the enterprise at the instance of Hubbard, who suggested it, and that it was for the purpose of detecting the Neeley boys, who had a butcher shop in Cleburne; that the project was to take the cattle with the consent of Hunnicutt, the owner, which he understood Hubbard had procured, and dispose of them to the Neeley boys, and have them arrested for violating the law; and that they were to get a reward which had been offered by some persons in that community. This is a sufficient statement of the case to present appellant's assignments.

Appellant's first and second assignments raise an objection to the testimony of Ellis and Jack Hubbard to the effect that Hub-

bard was acting in the capacity of a detective at the request of Jim Ellis, Armstrong, Lawson, and old man Pierce: that is, at the instance of said parties, some months before the alleged theft, he had come to Burleson, and opened a "joint" where liquor, etc., was sold, in order to ferret out thefts in that community. The court explains the admission of this testimony upon the ground that defendant proved by the witness Hubbard that he had been engaged in running a "joint" at Burleson, and also that appellant brought out that Hubbard was acting as a detective, and the court thought it was permissible to show the capacity in which Hubbard acted throughout, and also to show who employed him to act in that capacity. We are not apprised that Burleson is a local option precinct, unless the meaning of the term "joint" would indicate that it was such. In that event, it is a doubtful proposition that a party can be employed to habitually violate the law in order to detect criminals. Nor do we think that it was proper to show who employed appellant to act as a detective, unless appellant questioned the right of Hubbard to act as such detective.

The fourth bill of exceptions presents the matter of the employment of this detective in a graver light; that is, according to the bill, the State was permitted to prove that the detective came to the town of Burleson, and went into the "joint" business at the instance and request of Ellis and some of the citizens, to get acquainted with Ernest Mercer and John McGee, and see if he could catch them. The court explains this by stating that defendant proved on cross-examination of the witness Hubbard that he had been engaged in the "joint" business in Burleson in the capacity of detective, and the court permitted him to state that he bought an interest in the business and went into it for the purpose of detecting those engaged in stealing, as they frequented this place; that those who employed him suggested this course. As explained, we do not understand that the court negatives the statement in the bill to the effect that the detective was employed by certain citizens to detect appellant and Mercer in the commission of the crime, as the court says he admitted the testimony for the purpose of detecting those engaged in stealing, evidently alluding to the testimony with reference to McGee and Mercer. This, in our opinion, was a mode of getting before the jury hearsay testimony in regard

to other offenses of a very damaging character against appellant. Nor do we understand that the attempt by the court in the ninth subdivision of the charge to limit the effect of this testimony to be considered by the jury as showing, or tending to show, the capacity in which said Hubbard acted, and they could not consider the same as any evidence of the guilt of defendant, was calculated to rectify the evil; for it showed that the jury were still authorized to use the testimony as showing that Hubbard had been employed to catch appellant and Mercer, suggesting to them that the community suspected these parties of thefts, and they desired them caught.

The real battle ground on the trial was as to whether or not Hubbard had the express or implied consent of Hunnicutt, the owner, to the taking of the cattle; it being contended by appellant, if he had such consent, either express or implied, and that he engaged with Hubbard and Mercer in the commission of the offense, that the consent given by Hunnicutt to Hubbard was consent to all. On the other hand, the State contends that Hunnicutt did not give his consent to the taking of the cattle, and that Hubbard had neither his express nor implied consent, and that consequently the court did not err in charging as he did on the issues presented by the testimony, or in refusing to give appellant's requested instructions on the subject. The court's charge on this line was substantially as follows: "If you believe from the evidence that the said H. T. Hunnicutt agreed or consented for the defendant or Mercer, or either of them, to take such cattle; or if the said Hunnicutt consented to the State's witness Hubbard to take said cattle, and that the said Hubbard induced or procured defendant to join him in taking said cattle; or if you believe from the evidence that said Hubbard informed or by his acts or words or both led defendant to believe that the said Hunnicutt had consented for them to take said cattle; that the defendant joined said Hubbard and Mercer, and, while acting alone or in connection with said parties, took said cattle under such belief, whether said Hunnicutt had actually consented or not,—then, in either of said events, you will find defendant not guilty." It is contended by appellant that this charge did not instruct the jury or inform them as to any implied consent on the part of Hunnicutt to the taking, or instruct them as to the nature of such consent; and, moreover, that the charge required

the jury to believe that Hubbard induced or procured defendant to join in the enterprise, whereas appellant insists that, if Hunnicutt either expressly or impliedly agreed for Hubbard to take the cattle, this consent inured to appellant's benefit, regardless of whether or not Hubbard induced them to join in the enterprise. On this proposition appellant asked a number of charges, all of which, in one shape or another, raise the question of express or implied consent of Hunnicutt to the taking. These charges were refused by the court, and appellant assigns as error the action of the court, both in giving the charge heretofore quoted and in refusing his special instructions.

In *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126, the question of consent on the part of the owner to the detective, and participation of the detective with the parties intended to be entrapped, and the bearing of such consent and participation on the guilt of the parties, is discussed, and a number of authorities collated. In that case it appeared that Pinkerton's Detective Agency, in Chicago, received by some means a number of letters and postal cards, written by defendant from Dallas to a friend in Chicago, urging him to come to Dallas, and join him in breaking into and robbing some of the banks in the latter city. These letters were forwarded by the agency to a banker in Dallas, who immediately called a meeting of the bankers, and submitted the matter to them. As a result, Pinkerton was requested to send a detective to Dallas to work up the case. Three detectives were sent to Dallas to work up the case, who immediately put themselves in communication with the bankers in regard to the matter. It was finally agreed that the banking house of Adams & Leonard should be broken into on Sunday night. Adams & Leonard agreed to the adventure, and the detectives were in the venture, working in their employ. Pursuant to the plan agreed upon, several officers of Dallas county entered and took possession of the bank during the daytime, and remained there until the burglary was to be effected that night. About 1 o'clock at night the back door of the bank was forced open by the two detectives, Wood and McGuire, who came in and spoke to the concealed parties, and went into the vault. After remaining about an hour, Wood went out, told Speiden (the defendant) they wanted more help, and returned in a short time, and, coming in, closed the

door after him. In a minute or two Speiden came in, and closed the door, when the officers arrested him. Summing up, the court say: "To our minds, it is clear that Deroso and the other detectives were the servants and agents of Adams & Leonard, and had full authority to consent to defendant's entry into the bank, and that his entry was not only with their consent, but at their solicitation. The case is somewhat like that of a man being robbed by his own consent, although the supposed robbers did not know of the consent." And see *Pigg v. State*, 43 Tex. 108; 1 Bish. Cr. Law, § 262; 1 Whart. Cr. Law, § 149.

In *Robinson v. State*, 34 Tex. Cr. R. 71, 29 S. W. 40, 53 Am. St. Rep. 701, which held that no consent of the owner was given under the facts of that case, the principle enunciated in *Speiden's Case* was not gainsaid; but a distinction was drawn between said case and that case. In the latter case there was no question but that Robinson suggested the entire matter to Cox, the detective, who reported it to McDowell, the owner of the alleged burglarized premises. McDowell replied to Cox by saying: "Just let him [defendant] come along, and we will try and catch him, and not insist on his coming, and not encourage him to come. If he comes, let him come of his own free will and accord and voluntarily." "I just said, 'Let him come ahead, and not to stop him.'" As said in the opinion, there was no conflict in the testimony of McDowell and Cox upon this issue.

In this case it is true that Hunnicutt testified in a somewhat similar strain. He says that "Hubbard told me there was a cattle steal on hand; that John McGee and Earnest Mercer had made a proposition to me to steal my cattle; that they had two other bunches spotted, but that they would probably steal my cattle. He said that he himself was working to catch them, and I told him that they had better let my cattle alone, but if they came to get my cattle to go ahead and catch them. I do not remember that he asked me if I wanted them caught. He said he would not get them unless he notified the parties first to whom they belonged; that he did not expect to get into any trouble to catch them. I told him that I wanted them caught if they got my cattle." Hubbard testified on this point as follows: That he told Hunnicutt that he, with John McGee and Earnest Mercer, calculated to steal a bunch of cattle somewhere, and that his bunch had been spoken of, and that his cattle might be stolen. He fur-

ther testified: "I went to see Hunnicutt about this cattle stealing, and told him that I wanted the party from whom we wanted to get the cattle to be informed beforehand. I did not want to take any chances on being on a man's place. I might get killed." From this it is evident that Hunnicutt gave his consent to the taking, and this is made manifest also by the fact that Hunnicutt and Ellis went to where the theft was committed and lay in wait, and watched the parties on the night of the theft.

As to the other proposition, as to whether or not the enterprise was suggested and brought about by appellant and Mercer, and that Hubbard entered into it at their suggestion, there is controversy in the testimony. Hubbard claims in his evidence that the matter of the theft of the cattle was suggested by appellant, or appellant and Mercer, whereas appellant denies this, and claims that he went into it at the instance of Hubbard to detect the Neeley brothers. Aside from the direct testimony, there are some circumstances which would suggest that the enterprise was suggested and brought about by Hubbard. He had gone into the community, according to the uncontroverted testimony, for the purpose of entrapping or decoying McGee and Mercer into the commission of some offense. It seems he waited a number of months before anything was accomplished, and, according to his own evidence, after it was suggested to him by appellant he actively engaged in arranging the program; went to see Hunnicutt and arranged that branch of it; obtained his consent; and then went with appellant and Mercer, and arranged with the Neeley boys at Cleburne, who were to receive the cattle. But, whether the circumstances support appellant's theory or not, still as to who projected the enterprise, whether Hubbard (the detective) or appellant, is certainly a controverted question. Now, if the jury should believe that the detective inaugurated the enterprise, and that he had the consent of Hunnicutt to the taking of the cattle, and which it seems to us he did, then undoubtedly, if Hunnicutt gave his express or implied consent to Hubbard to the taking of the cattle, or if appellant reasonably believed that such consent had been given to Hubbard, whether express or implied, in either event he was entitled to an acquittal. This question was not fairly presented to the jury in the court's charge and the requested instructions, or some of them, should have been given.

It is not necessary to discuss other features of the case, but for the errors pointed out the judgment is reversed, and the cause remanded.

NOTE.—In 12 Amer. Crim. Rep. 293 to 302 we gave an extensive review of the law relating to "entrapment." See also:—*Williams v. State*, 1 Amer. Crim. Rep. 413; *People v. McCord*, 8 Amer. Crim. Rep. 117; *Roberts v. Territory*, 11 Amer. Crim. Rep. 193; *State v. Abley*, 12 Amer. Crim. Rep. 279; *State v. Waghalter*, 12 Amer. Crim. Rep. 283.

COOPER ET AL. V. COMMONWEALTH.

110 Ky. 123;—22 Ky. Law. Rep. 1625;—52 L. R. A. 136;—60 S. W. Rep. 938.

Decided February 27, 1901.

LARCENY: *Conversion of over payment; when not larceny.*

1. It is not larceny to convert the excess of an overpayment; unless a felonious intent to steal exists at the time the money was received.
2. Four person received six dollars as wages, and desiring to divide the same, one of them—Waggener—applied to a bank to change a two dollar bill. He was handed two half dollars and a roll of small coin wrapped in paper, with the remark, "there are twenty nickels." Waggener rejoined his companions; after walking four blocks, the package was opened and found to contain twenty five-dollar gold coins. Waggener remarked, "boys, banks don't correct mistakes;" whereupon the money was divided among the four.

The court instructed the jury, that if the jury believed from the evidence to the exclusion of a reasonable doubt, that at the time of the unwrapping of the package, the parties knew that the gold was delivered by mistake, and that they knew or had means of knowledge that the bank was the owner of the gold, and that they thereupon feloniously converted the same to their own use with intent to permanently deprive the bank of the ownership of the same, that the verdict should be guilty.

Appeal from Circuit Court, Marion County.

"To be officially reported."

Grant Cooper and others convicted of grand larceny, appeal. Reversed.

Geo. A. Prentice, for the appellants.

Robt. J. Breckinridge, for the Commonwealth.

O'REAR, J. Appellants, Grant Cooper, Fred Cooper, Thomas Harris, and Sandy Waggener, were convicted in the Union Circuit Court of the crime of grand larceny, under the following

state of facts: The four named had been shucking corn, and were paid \$6 for their services. In order to divide the money equally among themselves, they went to the Bank of Uniontown to have \$2 of the money changed into smaller denominations. Appellant Sandy Waggener went into the bank and to the cashier's counter, handed him the \$2, and asked for the change. The cashier handed him two half dollars and a roll of small sized coin wrapped in paper, saying: "There are twenty nickels." Waggener, without unwrapping the coins, and not knowing what was in the paper, except from the statement of the cashier, rejoined his companions; and the four together went a distance of some four squares, to a more secluded spot to divide their money. On opening their package they discovered it contained 20 5-dollar gold coins, instead of nickels. Waggener remarked: "Boys, banks don't correct mistakes," and the money was divided among the four and appropriated by them. Upon this evidence the court gave the jury the following instruction: "If you believe from the evidence, to the exclusion of a reasonable doubt, that in this county, and prior to the finding of the indictment herein, the defendants, Grant Cooper, Fred Cooper, and Thos. Harris, and Sandy Waggener, sought to have some money changed at the Bank of Uniontown in order to get twenty nickels, or some small change, and that Chas. Kelleners, the assistant cashier of said bank, in making said change delivered by mistake to the defendants twenty five-dollar gold pieces, wrapped in a paper, believing at the time that he was giving them twenty nickels, and that the defendants sharing in that belief, shortly thereafter opened said paper, and found therein twenty five-dollar gold pieces, and failed to return said gold pieces to said bank—Now, if you further believe from the evidence, to the exclusion of a reasonable doubt, that when said defendants unwrapped said paper, and found therein, and in their possession, the said five-dollar gold pieces, they knew that same had been delivered to them by said Kelleners through mistake, and knew or had the means of ascertaining that the bank was the owner of said gold pieces, but thereupon nevertheless feloniously converted the same to their own use, intending to permanently deprive the owner thereof, you will find them guilty as charged; and in your verdict you will fix their punishment at confinement in the penitentiary for not less than one, nor more than five years."

Appellants objected to the foregoing, and asked the court to give the jury these instructions: "(a) The court instructs the jury that, to find the defendants guilty of larceny, they must believe that at the time they received the money from Chas. Kelleners they must have then had the purpose and intent to convert the excess which they received over and above what was justly due them as change to their own use and benefit, and to deprive the bank of its money feloniously; that, unless the felonious intent was proven at the time of the receiving of the money, the law is for the defendants, and the jury will so find. (b) The court instructs the jury that the felonious intent must exist at the time of receiving the money, and that no felonious intent, subsequent or wrongful conversion, will amount to a felony," which were rejected by the court.

It was held in *Elliott v. Com.*, 12 Bush, 176, that where the possession of the goods was obtained by the accused for a particular purpose, with the intent then, however, on the part of the accused, to convert them to his own use, which he subsequently did, it would constitute larceny. In *Snapp v. Com.*, 82 Ky. 173, we held that, where money came into the hands of the accused lawfully, his subsequent felonious conversion would not be larceny. In the last-named case the court said it devolved upon the Commonwealth to show an unlawful taking of this money from the city (the owner) by the accused with a felonious intent, and that "the money had been received without fraud and as a matter of right, and in such a case, although he may have the *animus furandi* afterwards, and convert it to his own use, he was not guilty of larceny." In *Smith v. Com.*, 96 Ky. 87, 27 S. W. 852, this court announced, "The general and common-law rule is that when property comes lawfully into the possession of a person, either as agent, bailee, part owner, or otherwise, a subsequent appropriation of it is not larceny, unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands." Whart. Cr. Law, § 958, says, "To constitute larceny in receiving an overpayment, the defendant must know at the time of the overpayment, and must intend to steal." The authorities seem to be agreed that, to constitute the crime of larceny, there must be a simultaneous combination of an unlawful taking, an asportation, and a felonious intent.

We conclude that the instructions asked by appellants should have been given to the jury, and that the idea expressed in the first instruction given,—that if appellants received the money under a mutual mistake, and after discovering it feloniously converted it,—should not have been given. Judgment reversed and cause remanded for a new trial, and for proceedings consistent herewith.

TARRANGA v. STATE.

44 Texas Cr. Rep. 385—71 S. W. Rep. 597.

Decided January 14, 1903.

LARCENY: Touching, but not securing possession of money, no larceny.

Inserting the hand into another's pocket and simply touching but not securing money therein, is not larceny.

Appeal from District Court, El Paso County; Hon. A. M. Walthall, Judge.

Silvester Tarranga, convicted of theft from the person, appeals. Reversed.

Robt. A. John, Assistant Attorney General, for the State.

BROOKS, J. Appellant was convicted of theft from the person, and his punishment assessed at confinement in the penitentiary for a term of seven years.

The only question necessary to be reviewed is the sufficiency of the evidence. Prosecuting witness testified: That he was standing in front of the Wigwam saloon in El Paso, listening to the Salvation Army girls singing. A large crowd was present. That he was standing with his back towards the saloon, and facing the Salvation Army people, who were in the street. "My hands were down by my side, and I was on the edge of the sidewalk. While standing there, a lady came pushing through the crowd, and I stepped backwards to make room for her to pass. I then felt some one's hand in my right-hand pants pocket. Immediately I wheeled around, and observed defendant removing his hand from my pocket. I asked him why he put his hand in my pocket, but he denied having done so, and became very abusive. I saw a policeman standing near, called him, and had defendant arrested. There were three silver dollars, American

money,—that is, money current as coin in the United States of America,—and eighty cents, small change, in the pocket in which defendant put his hand. Defendant must have had his hand on the money, because the hand was entirely in; that is, when I observed it, it was in the pocket clear up to the wrist joint. The pocket was not deeper than my hand's length; that is, from the end of my fingers to the wrist joint. That is why I say he must have had his hand on the money. As I wheeled around, defendant was drawing his hand from the pocket. After the hand was extricated, all the money was still in my pocket." In order to constitute theft from the person, the evidence must show that the property or money has come into the possession of the accused. The bare touching of the money would not constitute such possession as the law requires. The facts of this case are much like those in *Rodriquez v. State* (just decided), 71 S. W. 596, and for a collation of the authorities see that opinion.

Because the evidence is not sufficient to support the verdict, the judgment is reversed, and the cause remanded.

RODRIQUEZ V. STATE.

Texas—Court of Criminal Appeals—71 S. W. Rep. 596.

Decided January 14, 1903.

LARCENY: *Ineffectual attempt to sever diamond pin from shirt front. no larceny.*

Seizing hold of and attempting to unscrew a diamond pin from another's shirt front, but not severing, it is no larceny.

Appeal from District Court, El Paso County; Hon. A. M. Walthall, Judge.

Jesus Dodriquez, convicted of crime, appeals. Reversed.

Robt. A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. This conviction was for theft from the person under the following circumstances: The alleged owner of the property stated that while at Washington Park, in El Paso city, waiting for a street car, he stepped to the door of the waiting room to ascertain if such car was approaching. As he did so, he felt something pulling at his shirt front, and, upon

looking to ascertain what it was, saw that some one was undertaking to unscrew from his shirt a valuable diamond pin. About the time the party had succeeded in half unscrewing it, he caught his hand, and held onto him, pulling him to the light, turned him over to the officer; and this party proved to be appellant. This is the condition in which the testimony leaves the transaction as to appellant's appropriation, or, rather attempted reduction, of the property to his possession. We agree with appellant that this is not sufficient evidence to show a taking. It was unquestionably an attempt to get possession, but it is as clearly evident that, by reason of the owner's interference, appellant did not obtain such possession. It was not removed from the shirt front, but at the time of appellant's arrest, so far as the record is concerned, it still remained fastened to the shirt. It has been held that, where the evidence shows that a party charged with theft from the person had succeeded in placing his hand in the pocket of the person from whom the property was sought to be taken, and had grasped the pocketbook, and was in the act of extricating it from the pocket, the theft was complete. For collation of authorities, see *Files v. State* (Tex. Cr. App.) 36 S. W. 93. But in those cases the alleged thief had gotten the property clearly within his possession; his hand had grasped and taken control of the pocketbook. Where that is the case, the removal of the property is not necessary. But in this case appellant had never secured possession of the property. He was attempting to do so, and, had he succeeded in detaching the pin from the shirt front, the taking would have been complete. The intervention of the owner prevented the taking.

Because, in our opinion, the evidence is not sufficient, the judgment is reversed, and the cause remanded.

NOTE.—*Examples as to what is or is not a sufficient asportation to constitute larceny:—*

A woman put her hand into the pocket of another woman, whereupon a police officer seized the wrist of the same hand, and in the struggle the pocket was torn and a pocket-book fell to the ground; but there was no evidence that the pocket-book was touched by her hand. Held, —that even if there was a felonious intent, there was no caption and asportation to constitute larceny. *Commonwealth v. Luckis*. 99 Mass. 431; 96 Am. Dec. 769.

Taking a coat from a dummy, which was still fastened to the dummy by a chain running through the sleeves, and, the dummy being tied to the

building by a string, is not larceny. *People v. Meyer* 75 Cal. 383; 17 Pac. Rep. 531.

Although done with felonious intent, the mere upsetting of a barrel of turpentine, is not a sufficient asportation to constitute larceny. *State v. Jones*, 65 N. C. 395.

In *Williams v. State*, 63 Miss. 58, it was held that there was not a sufficient asportation shown, where the defendant shot another's hog, turned it on its back, cut its throat and left without doing any thing further towards removing it; but in *Kemp v. State*, 89 Ala. 52; 7 So. Rep. 413, it was held, that shooting several hogs and cutting the throat of one of them was sufficient asportation to constitute larceny. In the latter case the defendant on being discovered fled which distinguishes it from the former.

Putting the hand into a pocket of another, seizing a pocket-book and raising it about three inches from the bottom of the pocket and then being prevented from further removing it, constitutes larceny. *Harrison v. People*, 50 N. Y. 518; 10 Am. Rep. 551. To substantially the same effect is, *Flynn v. State*, 42 Texas, 301 and *State v. Chambers*, 22 W. Va. 779; 46 Am. Rep. 550.

It is a sufficient taking to constitute larceny, if with felonious intent, wheat is taken, from its place in a granary; placed in sacks and tied up. *State v. Hecox*, 83 Mo. 531.

If the thief removes the goods from the place where they were, and has possession but for a moment, the larceny is complete. *State v. Jackson*, 65 N. C. 305.

Removing a money drawer from a safe and then handling the money, at the door of the safe, is sufficient asportation to constitute larceny. *Green v. State*, 81 N. C. 560.

FOSTER V. STATE.

117 Ga. 39—43 S. E. Rep. 421.

Decided February 7-10, 1903.

LARCENY: *Distinction between larceny and false pretences in obtaining the title to goods.*

1. Where one by false representations induces another to sell him certain personal property on credit, and the sale is completed by delivery and is unconditional, the intention being that the title should pass, there is no larceny. *Kellogg v. State*, 26 Ohio St. 16; *Harris v. State*, 7 S. E. 689, 81 Ga. 758, 12 Am. St. Rep. 355; Clark, *Crim. Law* (2d Ed.) 290; 2 Clark & Marsh, *Crimes*, § 318. (Syllabus by the Court.)

Error from City Court of Griffin; Hon. E. W. Hammond, Judge.

Austin Foster convicted of larceny, brings error. Reversed.

Thos. W. Thurman, for the plaintiff in error.

O. H. P. Slaton and J. D. Boyd, for the State.

SIMMONS, C. J. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

NOTE.—Here are two English cases, bearing on the same subject:—

REX v. PHINEAS ADAMS.

Russell & Ryan 225.

If the ownership of goods is parted with it is no felony, though the owner has been induced to part with them by a fraudulent representation. Property cannot be laid in a person who has never had either actual or constructive possession.

Crown Case Reserved—Easter Term 1812.

The prisoner was tried before Mr. Justice Chambre, at the Lent assizes held at Taunton, in the year 1812, for a grand larceny in stealing a hat, stated in one count to be the property of Robert Beer, and in another count to be the property of John Paul.

The substance of the evidence was, that the prisoner bought a hat of Robert Beer, a hat maker at Ilminster. That on the 18th of January he called for it, and was told it would be got ready for him in half an hour, but he could not have it without paying for it.

While he remained with Beer, Beer showed him a hat which he had made for one John Paul; the prisoner said he lived next door to him, and asked when Paul was to come for his hat and was told that he was to come that afternoon in half an hour or an hour. He then went away, saying he would send his brother's wife for his own hat.

Soon after he went he met a boy to whom he was not known, the prisoner asked the boy if he was going to Ilminster, and being told that he was going thither, he asked him if he knew Robert Beer there, telling him that John Paul had sent him to Beer's for his hat, but added that as he the prisoner owed Beer for a hat which he had not money to pay for, he did not like to go himself, and therefore desired the boy (promising him something for his trouble) to take the message from Paul and bring Paul's hat to him the prisoner; he also told him that Paul himself, whom he described by his person and a peculiarity of dress, might perhaps be at Beer's, and if he was the boy was not to go in.

The prisoner accompanied him part of the way and then the boy proceeded to Beer's, where he delivered his message, and received the hat, and after carrying it part of the way for the prisoner by his desire, the prisoner received it from him, saying he would take it himself to Paul.

The fraud was discovered on Paul calling for his hat at Beer's, about half an hour after the boy had left the place; and the prisoner was found with the hat in his possession and apprehended.

From these and other circumstances, the falsity of the prisoner's representation and his fraudulent purpose were sufficiently established; but it was objected to on the part of the prisoner, that the offence was not larceny, and that the indictment should have been upon the statute for obtaining goods upon false pretences.

The prisoner was convicted, but the learned judge forebore to pass sentence, reserving the question for the opinion of the judges.

In Easter term, 25th of April, 1812, all the judges were present (except Lord Ellenborough, Mansfield C. J., and Lawrence J.,) when they held that the conviction was wrong, that it was not larceny, but obtaining goods under a false pretence. (a)

(a) See *Pear's Case*, 2 East. P. C. 685. *Coleman's Case*, *ibid.* 672. *Atkinson's Case*, *ibid.* 673.

REGINA V. JOSEPH BARNES.

2 Denison's Crown Cases, 59.

A., a servant, had authority in the absence of the chief clerk to buy kitchen stuff for his masters, and to make payment to the seller. The chief clerk was directed by the master to repay A. For such purchases upon the bare production by A. of a ticket containing a statement of such a purchase having been made. A. produces to the chief clerk a ticket containing a statement of a purchase which had not in fact been made; and thereupon the chief paid him 2s. 3d.

Held, that A. was not indictable for larceny, but for obtaining money under false pretences.

Crown Case Reserved—December 1850.

Joseph Barnes was tried before *J. Deedes*, Esq., Recorder, at the October Quarter Sessions, A. D. 1850, for the city of *Canterbury* and county of the same, upon an indictment which charged that he being a servant to *George Neame*, and another, feloniously stole two shillings and three pence, the property of his masters. The prosecutors were grocers in the city of *Canterbury*, and the prisoner at the time of the alleged offence had been their servant about three years. They were in the habit of purchasing large quantities of what was called "kitchen stuff" to melt down. The course of business was for the sellers of the "kitchen stuff" to take it to the prisoner upon Messrs. *Neame's* premises. It was his duty to receive it and weigh it, and if the chief clerk was in the counting-house to give to the seller a ticket containing the date of the purchase, the weight, the price, the name of the seller, and the initials of the prisoner. The seller then took the ticket to the chief clerk, who paid him the price out of moneys furnished to him by the prosecutor for that purpose. In the absence of the chief clerk from the premises when any "kitchen stuff" was brought, the prisoner had authority himself to make the payment to the seller, and on afterwards producing to the clerk a ticket containing the above particulars he repaid the prisoner out of

the moneys so furnished to him by the prosecutors. The clerk was instructed by Messrs. *Neame* to pay all demands made by the prisoner in this way, upon the production by him of the ticket, without any inquiry as to whether any stuff had been really bought, or as to the quantity, or whether the alleged seller was or was not a customer of the firm. Upon the evening of the thirteenth of *September* the prisoner went to the chief clerk in the counting-house and demanded two shillings and three pence, which he said he had paid for eighteen pounds of "kitchen stuff." He produced a ticket in the usual form containing the name of *Scott* as the seller, and two shillings and three pence as the price, and received that sum from the clerk from the moneys so furnished to him, which the prisoner applied to his own use. There had been no such dealing as that alleged by the prisoner, nor any such payment by him, nor had the prosecutor any customer of the name of *Scott*.

It was objected on behalf of the prisoner that this was not a felony, because the property in the money, and not the possession only, was parted with by the prosecutors, and that the indictment should have been for obtaining the money by false pretences, and *R. v. Witchell*, 2 East, Pl. Cr. 830, was relied upon.

The Recorder was of opinion, that although the facts might have supported an indictment for false pretences, yet that the prisoner, looking at the situation he filled as servant to the prosecutors, was guilty of felony, if the jury believed that he had obtained the money, knowing at the time he was not entitled to receive it, and had applied it to his own use. The Recorder left the facts to the jury, who found the prisoner guilty, and he was sentenced to be imprisoned four calendar months, with hard labor, in the city gaol. The question for this Court was, whether the facts stated supported the indictment.

This case was considered by Pollock C. B., Wightman J., V. Williams J., Talfourd J., and Martin B.

On 20th *December*, 1850, Pollock C. B. delivered the following judgment: (a)—The Court are of opinion, that as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him, the latter was not liable to be indicted for a larceny, but only for obtaining money under false pretences. The conviction was, therefore, wrong. (b)

(a) The other Judges present were Maule J., Cresswell J., V. Williams J., and Talfourd J.

(b) Vide *R. v. Adams*, 1 Den. C. C. 38, and third Report of the Criminal Law Commissioners, pp. 9-14, 10th June, A. D. 1847.

VAN BUREN ET AL. V. STATE.

65 Neb. 223—91 N. W. Rep. 201.

Decided June 18, 1902.

LARCENY, committed in another jurisdiction—PRELIMINARY EXAMINATION, no bar to future prosecutions—Triple arrests denounced as vexatious, but held valid.

1. The preliminary hearing of a person accused of a felony, provided for by the Criminal Code, is in no sense a trial in which the rights of the accused in respect of his guilt or innocence are adjudicated and determined.
2. The preliminary examination provided for is to ascertain whether the crime charged has been committed, and if so, whether there is probable cause to believe the accused committed it, and, if such is found to be the case, to enforce his presence in the District Court to answer the charge, by either requiring the accused to enter, into a recognizance for his appearance in the District Court to answer the charge, or, in default thereof, committing him to imprisonment to await trial in the District Court.
3. Where a person who is charged with a felony is brought before an examining magistrate for the purpose of a preliminary hearing, the complainant at such hearing may dismiss or abandon such proceedings, and file a complaint for the same offense before another magistrate having authority to inquire into the charge; and upon such inquiry the accused may be recognized to appear at the District Court to answer such charge, and, in default of such recognizance be committed to prison to await trial.
4. And likewise a second preliminary hearing may be had where the first has resulted in a discharge of the accused.
5. A District Judge, within his district, is authorized to exercise the powers of examining magistrates generally with respect to preliminary hearings of persons accused of the commission of a felony.
6. The bringing into this State of goods or property stolen in another State is not larceny. *People v. Loughridge*, 1 Neb. 11, 93 Am. Dec. 325.
7. Instruction set out in the opinion authorizing a conviction of the crime of larceny where property has been stolen in another State, and brought by the thief into this State, held erroneous.
(Syllabus by the Court.)

Error to District Court, Cherry County; Hon. Westover, Judge.

George Van Buren and another convicted of larceny, bring error. Reversed.

Allen G. Fisher, for the plaintiffs in error.

F. N. Prout, Attorney General, and *Norris Brown*, Deputy Attorney General, for the State.

HOLCOMB, J. The plaintiffs in error, McLaughlin and Van Buren, who were defendants in the trial court, were informed against, and by the verdict of a jury found guilty of stealing a mare of the value of \$15, the personal property of one John Ray; the larceny charged being alleged to have been committed in Cherry County. After the overruling of a motion for a new trial and a motion in arrest of judgment, the defendants were sentenced to imprisonment in the penitentiary for a period of 7 and 5 years, respectively, and adjudged to pay the costs of prosecution. By proceedings in error the defendants bring the record of conviction here for review. Many alleged errors are assigned as grounds for reversal of the judgment of the trial court, a few only of which will be noticed and considered.

The preliminary examination for the purpose of inquiring whether an offense had been committed, and whether there was probable cause to believe the defendants guilty thereof, was had before the judge of the District Court, sitting as an examining magistrate. It appears from the record that a complaint charging the defendants with the crime of which they were afterwards convicted in the District Court was filed with the county judge of Cherry County, who issued a warrant thereon, and after the arrest of the defendants, and their appearance before him, on their application, granted a continuance of the hearing on the complaint charging them with the commission of the alleged offense for a period of 30 days, whereupon another complaint, charging the same offense, was filed with a justice of the peace acting as an examining magistrate, upon which a warrant was issued, and the defendants brought before him for a preliminary hearing. On the defendants application the justice of the peace granted a change of venue to another justice in a distant part of the county. A third complaint was then immediately filed with the district judge, and the defendants brought before him, where a preliminary hearing was had, resulting in their being held to the District Court, to answer the charge preferred against them. After the filing of an information against them in the District Court, the defendants presented a plea in abatement on the ground that the district judge had no jurisdiction or authority to act as an examining magistrate, and also because of the proceedings had before the county judge and justice of the peace alluded to. It was objected that the preliminary hearing of the

charge preferred against them was yet pending and undetermined, and that the filing of an information in the District Court under such circumstances was without warrant or authority of law, and therefore invalid. The record, we are prone to say, presents in this regard an extraordinary condition of affairs, and shows an undue activity on the part of the prosecution to force the defendants into a preliminary hearing without having a due regard to their rights, or the properties which should characterize proceedings of the kind then engaged in. We apprehend the spirit of the law requires that such proceedings should be conducted with deliberation, and with every reasonable opportunity accorded to those accused of crime to show either that no offense has been committed, or that there is no probable cause for believing them guilty of the offense charged. The State, with all the powers at its command, should not be made an instrument of oppression, nor be permitted to resort to unnecessarily harsh measures in order to bring an accused to a speedy trial, who, although accused of crime, is presumably innocent until guilt is established in the manner provided by law. A preliminary hearing, however, is in no sense a trial in which defendants' rights, in respect of their guilt or innocence, are adjudged, determined, or prejudiced, whether a hearing results in the discharge of an accused person, or in holding him to appear at the District Court to answer the accusation made against him. *In re Garst*, 10 Neb. 78, 4 N. W. 511; *Latimer v. State*, 55 Neb. 609, 76 N. W. 207, 70 Am. St. Rep. 403. The preliminary examination is to ascertain whether the crime charged has been committed, and, if so, whether there is probable cause to believe the accused committed it, and, if such is found to be the case, to enforce his presence in the District Court to enter into a recognizance for his appearance in the District Court to answer the charge, or, in default thereof, committing him to imprisonment to await trial in the District Court. *Latimer v. State*, *supra*. It is not required that the accused, where a complaint is filed charging the commission of a felony, should be taken before the magistrate issuing the warrant; but he may be taken before any magistrate having authority to make inquiry as to the truth of the complaint, and whether there is probable cause for believing the accused guilty of the offense charged. Nor do we think it can be doubted that in proceedings of this character the complainant may dismiss or

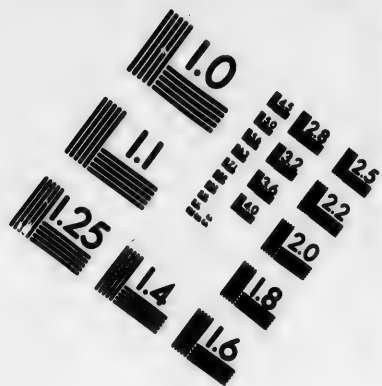
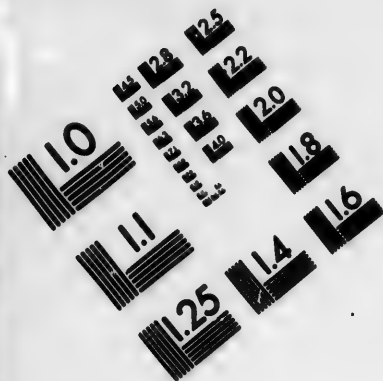
abandon his proceedings, and thus leave the accused as though no preliminary hearing had been held or was pending. Likewise, if a hearing has been had which results in a discharge of the accused, the proceedings so had would be no bar to the filing of another complaint, and another preliminary hearing thereon for the same offense before the same or another magistrate. In the case at bar, in legal effect, and in contemplation of law, it should be held, as it seems to us, that the complainant abandoned and dismissed the proceedings had and begun before the county judge and the justice of the peace for the purpose of having a preliminary inquiry or hearing before the District Judge sitting as an examining magistrate, and that such prior proceedings were in no sense a trial or an adjudication of the defendant's rights, and in no wise militated against the right or authority of the district judge to engage in such preliminary hearing, and make such order as appeared to be justified by the evidence produced thereat. The defendants could very properly plead in abatement to an information filed against them that they had had no preliminary hearing, but not that more complaints were filed against them before examining magistrates than the law contemplates in providing for a preliminary hearing before a trial in the District Court.

As to the authority of the District Judge to sit as an examining magistrate, and require persons accused of crime to enter into a recognizance for their appearance in the district court to answer the crime charged against them, or, in default thereof, to commit them to prison in order to secure their presence in the district court to answer such charge, we think this must be answered in the affirmative, under the provisions of section 262, Cr. Proc. It is there provided: "The judges of the District Courts in their respective districts, and the magistrates mentioned in section 260, in their respective counties, shall jointly and severally be conservators of the peace within their respective jurisdictions, and shall have full power to enforce or cause to be enforced all laws that now exist or that shall hereafter be made for the prevention and punishment of offenses, or for the preservation and observance of the peace. The said judges of the District Courts shall have the same powers to require securities for the keeping of the peace, and the good behavior, and bail for ap-

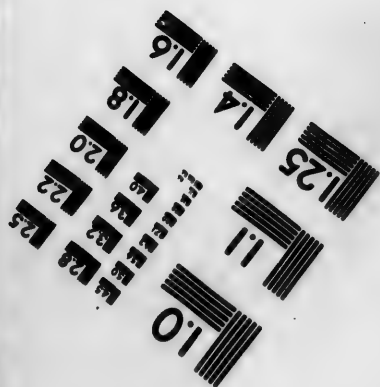
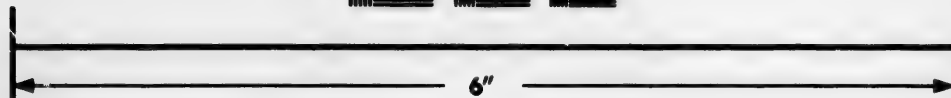
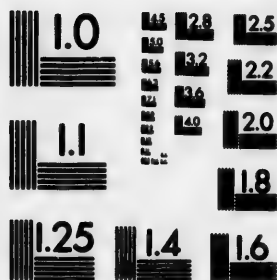
pearance in courts to answer complaints to keep the peace, and for crimes and offenses committed in their respective districts as any of the magistrates aforesaid have in their respective counties." This section gives ample authority to the District Judge within his district for the exercise of the same powers as examining magistrates generally in the examination of persons accused of crime, and to require their commitment or admission to bail to answer in the District Court the charges preferred against them. *State v. Dennison*, 60 Neb. 192, 82 N. W. 628.

On the trial of the case in the District Court there was evidence introduced tending to establish the fact that the mare, if stolen at all, was stolen in the State of South Dakota, and thereafter brought into this State, where she was traded by the defendants, as their own property, to a third party for another horse. In view of the evidence of the tendency and character mentioned, the trial court gave to the jury the following instructions: "You are instructed that there is some evidence tending to show that the mare in question was upon the Sioux Indian reservation, in South Dakota, some time previous to her being stolen; and should you find from the evidence that she was stolen while running upon the prairie on the Indian reservation in South Dakota, and afterwards brought into Cherry County and traded to the witness Dunbar, as shown by the evidence, then you are instructed that the larceny of said mare would be as complete in all respects as if she had been taken from the prairie or range in Cherry County, Nebraska, before she was so traded." This instruction is clearly erroneous under the law of this State as held and announced in the case of *People v. Loughridge*, 1 Neb. 11, 93 Am. Dec. 325, where it is declared: "The bringing into this State by the thief of goods stolen in another State is not larceny." While the courts of last resort of the different States are not altogether in harmony on the question of whether the asportation of stolen property from one State into another will constitute the crime of larceny in the State in which such property is brought, without any statutory enactment on the subject, we find by examination of the authorities on both sides of the question no good or sufficient reason for overruling the case of *People v. Loughridge*, supra, or departing from the law as therein enunciated. While it is the rule that where property is stolen in one county of a State, and the thief is afterwards

found in another with the stolen property in his possession, he may be indicted and convicted in either county, but not in both (*Stanley v. State*, 24 Ohio St. 170, 15 Am. Rep. 604), the reason for the rule, it would seem, on principle, would not extend to different States exercising jurisdiction entirely independent of each other, or to any one of the different States of the Union and foreign countries. The theory of the law, which treats each asportation of the property stolen in different places or counties in the same jurisdiction as the commission of the crime of larceny in any county where taken, is a constructive doctrine derived from the common law, and is held to for the purpose of giving the county where the thief is taken with the goods or property stolen jurisdiction to try and convict him of the original offense; such conviction being a bar to another, and the larceny being regarded as a continuing offense against the laws of the State; the venue merely fixing the place of trial. But under the common law the rule is that when goods are stolen in one country, and brought by the thief into another, the courts in the latter country are without jurisdiction to try and punish for the crime so committed. Even those courts of the different States of the Union which hold to the doctrine or rule as announced in the instruction copied herein, as to a larceny being committed in the State when stolen property is brought therein from another State, hold to the rule that, if the property is brought into such State from a foreign country, the crime of larceny is not committed in the State to which it is brought, and the courts of such State have no jurisdiction to try and punish the offender for the crime so committed in a foreign country. *Com. v. White*, 123 Mass. 433, 25 Am. Rep. 116; *Stanley v. State*, 24 Ohio St. 166, 15 Am. Rep. 604. As is said in *People v. Loughridge*, supra, the different States are altogether as independent of each other in point of jurisdiction as is the case between one State and a foreign country, or as between two foreign countries. Holding to the same doctrine and views as heretofore expressed by this court are the following: *State v. Brown*, 1 Hayward (N. C.) 100, 1 Am. Dec. 548; *State v. Reonnals*, 14 La. Am. 276; *Beal v. State*, 15 Ind. 378; *Lee v. State*, 64 Ga. 203, 37 Am. Rep. 67; *State v. Le Blanch*, 31 N. J. Law, 82; *State v. McCoy*, 42 La. Ann. 228, 7 South. 330; *Kiser v. Woods*, 60 Ind. 538; *Simmons v. Com.*, 5 Bin. (Pa.) 617; *People v. Gardner*, 2 Johns.



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(N. Y.) 477; *People v. Schenck*, Id. 479; *Simpson v. State*, 4 Humph. 456 (Tenn.). We cannot perceive how it may rightfully be said that property stolen in South Dakota, or in any other of the several States, and brought into this jurisdiction, can be said to have been stolen and a crime committed contrary to the laws of this State, in the absence of legislation making such action a crime. That the legislature may declare the bringing into this State property stolen in another an offense, and provide suitable punishment therefor, is abundantly supported by the authorities, but this phase of the subject is not before us. The very essence of the crime of larceny is a felonious taking and removing of the property stolen, and, taking being the chief factor or principal ingredient of the crime, there can be no crime unless there is a felonious taking; and the taking is the act by which control and dominion of the thing stolen is gained by the thief, and lost to the owner. Having possession of the property after being feloniously taken, or removing it from place to place after the commission of the crime, cannot be said, in the ordinary sense of the word, to be a new taking, or the commission of a new offense. To adopt the rule that the removal of stolen property from one State to another constitutes the crime of larceny in the latter is to establish the doctrine that a person committing the offense may be found guilty and be punished twice or thrice for the one offense, which is contrary to the most elementary principles of criminal jurisprudence. It would deprive a defendant and accused, many times, of compulsory processes for the attendance of witnesses to testify in his behalf. It would deprive him of the right to trial by a jury of his peers of the vicinage where the crime was committed. If the crime of larceny has been committed in our sister State of South Dakota, it is for those intrusted with the enforcement of law in that State to proceed under the law to bring the guilty parties to trial and punishment. It is for us to enforce the laws of this State, and properly proceed against and punish any found guilty of a violation thereof.

The instruction copied in the opinion being prejudicially erroneous, and authorizing a conviction where no offense against laws of this State has been committed, the judgment of imprisonment and for costs must for that reason be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

NOTE. (By J. F. G.).—Is it not logical, to hold that in all cases, the prosecution must be brought in the *County* and *State* where the taking occurred; especially so, where either the Constitution or a Statute entitles the accused to be tried in the *County* where the offense is committed?

STATE v. MAGGARD.

160 Mo. 469.—61 S. W. Rep. 184.

Decided February 26, 1901.

LARCENY—SEPARATE THEFTS—RULE AS TO VALUE OF STOLEN PROPERTY:
Separate and distinct thefts cannot be united to make grand larceny.

1. "The stealing of different articles of property at different times belonging to different persons, constitutes different offenses; but where the stealing of different articles of property at the same time, so that the transaction is one, it is but one offense, although the property stolen may belong to different persons."
2. As a general rule the value of stolen goods is determined by the market value of such goods; but where such goods have no market value, "the owner may testify to the actual value of the goods regardless of any market value."

Supreme Court of Missouri, Division No. 2.

Appeal from Circuit Court, Texas County; Hon. L. B. Woodside, Judge.

Lon Maggard, convicted of grand larceny, appeals. Reversed.

Clark Dooley and *Orchard & Saye*, for the appellant.

Edward C. Crow, Attorney General, and *Sam B. Jeffries*, Assistant Attorney General, for the State.

BURGESS, J. At the May term, 1900, of the Circuit Court of Texas County, the defendant, John W. Farrow, and Charles Smith were jointly indicted for grand larceny, which was alleged to have been committed on the 23d day of March, 1900, in that county.

On the 16th day of July, 1900, being the May adjourned term of said court, on motion of defendants named in the indictment a severance was granted, and upon the 18th day of July next thereafter the defendant Maggard, having been put upon his trial, was convicted of grand larceny as charged, and his punishment

fixed at two years' imprisonment in the penitentiary. From the judgment and sentence he appeals.

The property alleged to have been stolen consisted of overcoats, gloves, grain sacks, and various other goods and chattels belonging to five different persons, viz. E. E. Buck, Sidney Purcell, S. R. Townley, George Schoonover, Fred Brackett, and Henry Smith, all of whom lived in Texas County.

The day before the goods were stolen, these persons went to Cabool, a station on the Kansas City, Ft. Scott & Memphis Railroad, in said county, for the purpose of getting some corn that was being shipped to them at that place. When they got there, they drove into a lot, called by one of the witnesses a "wagon yard," unhitched their teams, and remained until the following day, when they discovered that certain of their property had been stolen. Buck's property, or at least a part of it, to wit, a collar and bridle, and his sacks and corn, had been taken by him from his wagon, and piled up in a shed. Purcell's property was in his wagon, Smith's in Keithley's shed loft in the wagon yard, and the property of Brackett, Townley, and Schoonover in different places in the wagon yard. When they discovered that their property had been stolen, a warrant was secured for the arrest of defendant, John W. Farrow, and Charles Smith, who were followed a few miles in the country, overtaken and the property found in their possession, and taken from them, and they put under arrest. After the officer had placed them under arrest and returned to Cabool with them, the defendant escaped, and was not apprehended again for several days thereafter, when he was found at Springfield, Missouri.

It is claimed by defendant that under the evidence he could only have been convicted of petit larceny, for the reason that the property of the different owners was located in different places at the time it was stolen, and each taking a separate and distinct offense, and, as the value of the property taken from any one place did not amount in value to as much as \$30, he could not be convicted of grand larceny.

The stealing of different articles of property belonging to different persons at different times constitutes different offenses, but where the stealing of different articles of property is at the same time and place, so that the transaction is the same, it

is but one offense, although the property stolen may belong to different persons.

In *Lorton v. State*, 7 Mo. 55, it is said: "The stealing of several articles of property at the same time and place undoubtedly constitutes but one offense against the laws, and the circumstance of several ownerships cannot increase or mitigate the nature of the offense." *Wilson v. State*, 45 Tex. 76; *State v. Morphin*, 37 Mo. 373. The same rule is announced in *Nichols v. Com.*, 78 Ky. 180.

But, where property belongs to different persons, and is located at different places, as in the case at bar, each asportation with intent to steal constitutes a different offense, although the thefts may all have been committed in rapid succession, and in pursuance of a formed design to steal.

In this case it was impossible, in consequence of the different locations of the property, that it could all have been taken at the same time, and, as the property stolen from any one place was not of the value of \$30 or more, there was no evidence authorizing an instruction for grand larceny.

Defendant asked the court to instruct the jury as follows:

"(9) The court instructs the jury that in arriving at the value of the property charged to have been stolen you are not to be governed by the value of the property to the owner, but you will be governed by what the evidence shows said property to have been actually worth on the open market."

The court refused the instruction as asked, struck out the words at the conclusion of the instruction, "on the open market," then gave it as amended, over the objection and exception of defendant. It is insisted that the action of the court in this regard was error, and that the standard of value was not what the property was worth to its owners, but what it would have brought in open market.

As a general rule, the market value of goods stolen, or that for which similar goods are, at the time and place of the theft commonly, in the markets, bought and sold, is the standard of value. But where things stolen have no marketable value,—for instance, a second-hand coffin (*State v. Doecke*, 68 Mo. 208), or secondhand clothing (*Pratt v. State*, 35 Ohio St. 514; *Prints v. People*, 42 Mich. 144, 3 N. W. 306) or brood sows (*State v. Walker*, 119 Mo. 467, 24 S. W. 1011),—the owner may testify

to the actual value of the property regardless of any market value for it. In the case at bar there was no evidence that any of the articles described in the indictment had a marketable value, but all of the evidence was directed to their actual value; hence no error was committed in amending the instruction, and in giving it as amended. *State v. Walker*, supra. There was no evidence to authorize it.

The indictment is in the usual form, and free from substantial objection. For the error of the court indicated, the judgment is reversed, and the cause remanded.

SHERWOOD, P. J., and GANTT, J., concur.

WHITE V. STATE.

Texas Court of Criminal Appeals—72 S. W. Rep. 185.

Decided February 11, 1903.

LARCENY: *Necessity to instruct as to misdemeanor where articles have been taken at different times.*

The accused who had opportunities to take goods from his employer's store, was found in possession of such articles which might have been taken at various times, and which he admitted were stolen—held, that the court should have submitted to the jury a charge, as to misdemeanor.

Appeal from District Court, Harris County; Hon. J. K. P. Gillaspie, Judge.

Sam White, convicted of theft, appeals. Reversed.

C. E. & A. E. Heidingsfelder, for the appellant.

Howard Marton, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of theft of property over the value of \$50, and his punishment assessed at confinement in the penitentiary for a term of seven years; hence this appeal.

There is but one assignment which need be noticed, that is, the refusal of the court to submit a charge on misdemeanor, based on the proposition that the property may have been taken at different times. The facts as shown by the record bearing on this issue are as follows: Appellant was the employe of prosecutor, who owned a store, where drygoods and articles of wear-

ing apparel were sold. Appellant was found in possession of the articles described in the indictment, which consisted of various articles of clothing—overcoat, suit of clothes, neckwear, cuff buttons, collar buttons, underwear, etc. None of these articles amounted in value to as much as \$50, some of them being of as much as \$10 in value—still the majority of them were of small value. Appellant, when found in possession of them, admitted the theft, but there was no testimony showing that they were all taken at one time. Appellant had an opportunity to have taken them at different times during his service with prosecutor, and the nature of the articles and the character of the theft would suggest that they must have been taken at different times. On this point prosecutor testified as follows: "I cannot tell whether they were taken all at one time, or a dozen different times. All I know is that I found them at Sam White's house, and he admitted stealing them. No, I cannot say that goods to the amount of \$50 or over were taken at any one particular time." On this state of facts, the court should have submitted a charge of misdemeanor, as complained of in appellant's motion for new trial. For this error, the judgment is reversed, and the cause remanded.

MOBLEY v. STATE.

114 Ga. 544.—40 S. E. Rep. 728.

Decided February 4, 1902.

LARCENY—SERVANT: *Conversion after special trust.*

When a master intrusts to his servant a bill for the purpose of getting the same changed and bringing back the change to the former, and the latter fraudulently appropriates the bill to his own use, and does not return either it or the change, he is guilty, not of simple larceny, but of larceny after trust.

(Syllabus by the court.)

Error to City Court of Macon; Hon. W. D. Nottingham, Judge.

Sol Mobley, convicted of larceny, brings error. Reversed.

W. E. Martin, Jr., and C. H. Hall, Jr., for the plaintiff in error.

Wm. Brunson, Solicitor General, for the State.

LUMPKIN, P. J. Applying the principle announced in the head-note to the evidence in this case, the verdict of guilty therein rendered was contrary to law, and a new trial is accordingly ordered. Briefly stated, the facts are as follows: Yates intrusted Chapman with \$5, with which to buy produce, with the understanding that the latter was to thus use the money and divide with Yates the profits realized from sales of the produce. Chapman invested the money thus received in a wagon load of plums. A customer purchased from Chapman 25 cents worth of the fruit, and handed him a \$5 bill, from which he was to take out the price of the purchase and return the change. Mobley was a servant of Chapman, working for him for wages. Chapman took the bill received from the customer and handed it to Mobley, with instructions to go off, get it changed, and bring back the change. Instead of so doing, Mobley fraudulently appropriated the bill to his own use, and did not return at all.

Upon this state of facts, Mobley was guilty, not of simple larceny, but of larceny after a trust delegated. His conviction of the former offense cannot, therefore, legally stand. The Solicitor General relied upon the decision of this court in *Finkelstein v. State*, 105 Ga. 617, 31 S. E. 589. It was there held: "Where a purchaser of goods delivers to the seller a bill of money exceeding in amount the price of the goods, intends that the seller shall return the proper change, and the latter accepts the bill for this purpose, but, instead of returning the correct change, appropriates to his own use, fraudulently and with intent to steal the same,—the bill so received,—he is guilty of simple larceny." It will readily be seen that this case is entirely different from the case now in hand. There no fiduciary relation existed between the seller and the customer who gave to him the bill to be changed. The parties were dealing at arm's length. Of course, in a loose sense, the customer "trusted" that the seller would return the proper change, and not fraudulently appropriate the bill to his own use; but there was no technical trust involved in the transaction, and no fiduciary relation existed between the parties. The case of larceny after a trust arises when there is an agency on the part of the person intrusted with the property of another, by virtue of which the person so intrusted is to do something with the property for his principal's benefit, or where there is a bailment of some description. In every case of this kind a

fiduciary relation necessarily exists. Of this character is the case before us. Mobley was the agent or servant of Chapinan. He was intrusted with the bill, to make a particular use of it for Chapman's benefit. Mobley violated the trust thus reposed in him, and fraudulently converted the bill to his own use. This makes a clean-cut case of larceny after a trust, and the point is well made that under the evidence a conviction of simple larceny was contrary to law.

Judgment reversed. All the justices concurring.

NOTES (By J. F. G.)—Independent of any qualifying statute, the facts stated in the opinion, would sustain an indictment for simple larceny at common law; for the possession of the master or employer continues in the servant or clerk; such servant or clerk only having the bare custody, and not the legal possession: hence a felonious conversion by such servant or clerk would be a trespass against the owner of the goods, and would constitute simple larceny.

The decision is explained by the fact, that in the Penal Code of Georgia, there are forty-three consecutive sections on the subjects of larceny and embezzlement. The general definition of simple larceny as given in section 155 of that code is practically the same as that of simple larceny at common law; but section 193 provides a more severe penalty of certain kinds of conversions by clerks and others. This latter section is evidently the one the court had in mind in rendering the above opinion; but whether that section takes the case out of the operation of section 155, which reenacts the common law, we leave to the sound judgment of our readers.

We here give several sections of the Penal Code of Georgia as follows:

Section 154: *The several kinds of larceny.* Larceny, or theft, as contradistinguished from robbery by violence, force, or intimidation, shall consist of: 1. Simple theft or larceny. 2. Theft or larceny from the person. 3. Theft or larceny from the house. 4. Theft or larceny after a trust or confidence has been delegated or reposed.

Section 155: *Simple larceny.* Simple theft, or larceny, is the wrongful and fraudulent taking and carrying away, by any person, of the personal goods of another, with intent to steal the same. The thief may be indicted in any county in which he may carry the goods stolen.

Section 174: *Other larcenies.* All simple larcenies of the personal goods of another, not mentioned or particularly designated in this Code, shall be punished as misdemeanors.

Section 193: *Clerks, agents, etc., fraudulently taking and converting goods intrusted to them.* If any person, employed in any capacity, in any store, or other place of trade or exchange, where from the nature of the business or employment, it is necessary or usual to intrust to such person any goods, or any other article of value, shall fraudulently take and carry away, or convert to his own use, or otherwise dispose of

any of the said goods or other thing of value, thus intrusted to him, or committed to his charge, to the injury and without the consent of the owner thereof, or person thus intrusting him, he shall be punished by imprisonment and labor in the penitentiary for not less than one year nor longer than five years.

Section 184: *Any other person so offending.* If any person who has been intrusted by another with any money, note, bill of exchange, bond, check, draft, order for the payment of money, cotton or other produce, or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished by imprisonment and labor in the penitentiary for not less than one year nor longer than five years.

Section 185: *Conversion when intrusted for collection.* If any person who has been intrusted by another with any note, bill of exchange, bond, check, draft, or order for the payment of money, for the purpose of collecting money or other thing due thereon and paying the proceeds over to the owner or other person so delivering the same, shall fraudulently convert the same or the proceeds of any part thereof to his own use, or shall otherwise dispose of the same, to the injury and without the consent of the owner or other person intrusting or delivering it, and without paying to such owner or person the full value or market price thereof, he shall be punished by imprisonment and labor in the penitentiary for not less than one year nor longer than five years.

Section 186: *Conversion when intrusted for selling.* If any person who has been intrusted by another with any cotton or other produce, or any goods, animal, or other articles of value, for the purpose of selling the same and paying the proceeds of such sale to the owner or other person so intrusting or delivering the article, shall fraudulently convert the same, or any part thereof, or the proceeds of any part thereof, to his own use, or shall otherwise dispose of the same to the injury and without the consent of the owner, or other person so intrusting or delivering it, and without paying to such owner or person the full value or market price thereof, he shall be punished by imprisonment and labor in the penitentiary for not less than one year nor longer than five years.

The following English cases are worthy of notice at this time:—

REX v. BASS.

1 Leach's Crown Law (3rd Ed.) 285—2 East P. C. 566.

If a servant to whom goods have been delivered by his Master to carry to a customer, sell them and convert the money to his own use, he is guilty of felony; for the possession is not out of the master by such delivery.

At the Old Bailey House in May Session 1782.

William Bass was convicted of stealing a quantity of goods the property of *John Gatsea*.

The prisoner was servant to the prosecutor, a gauze-weaver in Bishops-gate-street. On the day laid in the indictment he was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men who invited him into a public house to drink, and then persuaded him to open the package and sell the goods; which he accordingly did, and received eight guineas of the produce to his own use.

It was referred to the consideration of the Twelve Judges Whether from the above facts, the prisoner was guilty of a felonious taking?

Mr. Baron Hotham in December Session 1782 delivered it as the unanimous opinion of all the Judges, That the conviction was proper; for the prisoner standing in the relation of a servant, the possession of the goods, must be considered as remaining in the master until and at the time of the unlawful conversion of them by the prisoner. The master was to receive the money for them from the customer, and he could at any time have countermanded the delivery of them (a). The prisoner, therefore, by breaking open the package, tortiously took them from the possession of the owner, and having by the sale converted them *animo furandi* to his own use, the taking is felonious.

Many cases of this kind have occurred, and all of them have been determined to be felony. (b)

(a) See *Vale v. Bayle*, Cowp. 294-296.

(b) At the Old Bailey in October Session 1664, a prisoner was indicted for stealing a quantity of silk, the property of his master who was a Silk-Throwster. It appeared in evidence that the Silk-Throwster had men come to work in his own house; that the prisoner was one of them; that he delivered silk to him to work, and that he stole part of the silk so delivered to him; and Hyde, *Chief Justice*, Mr. Justice Kelynge and Mr. Justice Wile agreed that this was felony, notwithstanding the delivery of the silk to the party; for it was delivered to him only to work, and so the entire property remained then only in the owner; like the case of a Butler who hath plate delivered to him, or a shepherd who has sheep delivered and they steal any of them, that is felony at common law. Kely Rep. 55. And so says the same author, page 82, If one deliver goods to a porter in *London* to carry to a certain place and he taketh them and carrieth them away to another place, and there openeth and disposeth of them, it is felony; and he cites in support of this decision the Year Book 17 Edw. 4, fo. 9. pl. 10, a cause determined by the Twelve Judges in the Exchequer Chamber, which was thus: one person bargained with another to carry certain bales of goods and other things to *Southampton*, and he took them and carried them to another place and broke open the bales and took the goods contained therein feloniously and converted them to his own use, and disposed of them suspiciously; and this was held to be felony; for that notwithstanding the delivery, the property remained in the bailors.

REX V. BERNARD M'NAMEE.

1 Moody Crown Cases 368.

If a man who is hired to drive cattle sell them, it is larceny, for he has the custody only, not the right to the possession. His possession is the owner's possession, though he is a general drover, at least if he is paid by the day.

Crown Case Reserved—Michaelmas Term 1832.

The prisoner was convicted before Mr. Justice Gaselee, at the July Session at the Old Bailey, in the year 1832, of stealing 118 sheep, the property of Benjamin Sowerby; but a question having arisen during the trial, whether, in point of law, he could be considered guilty of felony unless at the time he received the sheep from the prosecutor to bring to London, he intended to steal them, the learned Judge desired the jury to give him their opinion as to that intention, respecting which the facts were as follows.—

The prosecutor, who lives at Messingham, in Lincolnshire, fifty miles from Grantham, had employed the prisoner in his service as a drover off and on for nearly five years, but not as a regular servant. He was a general drover, and lodged in the town; he agreed with the prosecutor for 3s. a day; that being what the prosecutor regularly gave drovers.

On Tuesday the 3d of April last he employed the prisoner to take 169 sheep to Grantham fair: prosecutor afterwards went to Grantham. He got there on Sunday afternoon the 8th, and found the prisoner there; he then had 163 sheep; he said he had sold five because they were lame, and sent one back. The prosecutor sold forty-four at Grantham, on Monday the 9th, and gave the prisoner orders and money to bring the 119 into the Smithfield market for him on Monday following; he was to be in the market on Monday with them. The prosecutor told the prisoner to stop on the road where other people did, and to meet him at the Spread Eagle in Gracechurch Street, on Sunday the 15th, at half-past four.

The prisoner had no authority from the prosecutor to sell the sheep.

The prosecutor went to the Spread Eagle at half-past four on the Sunday, and waited there till ten minutes past five, but the prisoner did not come. On the Monday morning he found 118 of the sheep at the market in the possession of different salesmen, into whose hands they had been put by a person by the name of Shelton, who had purchased them of the prisoner, who said they were his own, in answer to a question of Shelton's who first proposed buying the sheep, and did not know the prisoner before.

The jury found that the prisoner did not intend to steal the sheep at the time he took them into his possession.

The act of parliament for abolishing the punishment of death for cattle stealing having passed both Houses, and the royal assent to it being then daily expected, the learned Judge respited the sentence, that the opinion of the Judges might be taken upon the propriety of the conviction.

In Michaelmas Term, 1832, all the Judges (except Lord Lyndhurst, C. B., Littledale, J., and Vaughn, B.) met, and having considered this case, were unanimously of opinion that as the owner parted with the custody only, not with the possession, the prisoner's possession was the owner's, and that the conviction was therefore right.

CONLEY v. STATE.

69 Ark. 454—64 S. W. Rep. 213.

Decided June 29, 1901.

LARCENY BY BAILEE: *No guilt unless the bailee intended to deprive the bailor of the ownership in the property—Instructions.*

An extended use of property by a bailee, without the consent of the bailor is not larceny under the statute, if there is no intention to thereby deprive the bailor of the ownership in the property. The court erred in not clearly instructing the jury as to this principle.

Appeal from Circuit Court, Conway County; Hon. William L. Moose, Judge.

Peter Conley, convicted of a statutory crime, appeals. Reversed.

Peter Conley, pro se.

WOOD, J. The appellant was convicted of embezzlement. The proof on behalf of the State tended to show that he hired a team to go to a place called Solgohachie, about 9 miles from Morrillton, in Conway County. The party from whom he hired the team expected him to return it to Morrillton the next day, but, instead of doing so, he kept the team and used it for about six weeks, traveling in various counties in the State, until he was finally arrested with the team still in his possession, near Waldron, in Scott County, about 100 miles from Morrillton. The proof tended to show that, while the defendant was traveling about, he wrote letters to his bailor at Morrillton, promising to return the property, but in none of the letters did he inform the bailor for hire where he would be at any future time, so as to enable the bailor to locate him there. On behalf of the defense, the proof tended to show that the defendant expected to return the property to the owner. The court instructed the jury "that, in order to convict defendant, you must find beyond a reasonable doubt that the defendant, in this county and State, and

within three years before the finding of the indictment herein, unlawfully, feloniously, and fraudulently did convert to his own use and benefit the property of J. R. Faucett, described in the indictment, with the felonious intent to deprive said Faucett of his said property. To be guilty of embezzling the property, the defendant would have to do more than merely retain possession of and use it for a longer time than he had hired it for." The defendant asked, and the court refused, the following request for instruction: "To embezzle the property, the defendant would have to convert it to his own use, which means that he would have to sell or dispose of the property, or do some act which amounted to a holding in active dispute of the owner's right; and such acts on his part must have been with the fraudulent intent of depriving him of his property." The same idea was repeated in other requests given and refused. The statute provides: "If any * * * bailee shall embezzle, or convert to his own use, or make way with, or secrete with intent to embezzle, or convert to his own use, any * * * property which shall have come to his possession, * * * such bailee * * * shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny." Sand. & H. Dig., § 1712. The language in the court's charge, "convert to his own use," is the language used in the statute; but we are of the opinion that the lawmakers did not intend that anything short of a conversion of property by a bailee with the intent to make same his own, and thus permanently deprive the owner of the use and benefit thereof, should constitute the crime of embezzlement. They make the conversion of it "for his own use" larceny, placing it on the same grade as larceny. So far as the conversion is concerned, the essential elements of criminality are the same in embezzlement as in larceny; i. e. there must be a felonious intent at the time of the conversion of the property by the bailee to make the same his own. *Fleener v. State*, 58 Ark. 98, 23 S. W. 1. If the bailee only intends to use the property, and to return it (the specified property) finally to the owner, he is not guilty of embezzlement, although such use may be without the knowledge and consent, and contrary to the expressed wishes and directions, of the bailor. Such is the purport of the authorities. See appellant's briefs. The issue under the proof in this case was whether or not the defendant had unlawfully converted the prop-

erty to his own use in Conway County, so as to constitute embezzlement; that is, feloniously to deprive the owner permanently of his property. This should have been made clear to the jury in the instructions. The instructions were susceptible of the interpretation that a use of the property by the bailee without the design of depriving the owner permanently of his property was sufficient to establish the crime. The jury were the judges of the evidence and the credibility of the witnesses, and it was for them, under all the evidence, to say what the intent of the defendant was. For the error in refusing requests for instructions in accord with the principles above announced, the judgment is reversed, and cause remanded for new trial.

NOTE (By J. F. G.).—Although the general conclusion of the court in the above opinion is correct, there seems to be a misapprehension, as to the crime of "Embezzlement." At common law, larceny was the stealing of personal property by one who had no legal title or possession. Where a master permitted his servant to handle and care for his money or goods, the legal possession of the master continued, the servant only having a bare custody; hence, if the servant wrongfully converted such money or goods to his own use, he was guilty of larceny, for it was a trespass against the owner; but, if the servant converted money or goods which he received *for* but *not from* his master, the master never having actual possession, there was no trespass, and, hence, no larceny. To cover the latter class of cases, were enacted the statutes of "Embezzlement." The conversion of property by a bailee, holding the same by contract, was held not to be larceny, because a contract of bailment carries with it a legal possession, in which case there can be no trespass.

JACKSON v. STATE.

116 Ga. 578—42 S. E. Rep. 750.

Decided November 13, 1902.

LARCENY FROM THE PERSON: *Elements of the offense—Open taking—Evidence fails to show criminal intent.*

1. The evidence in this case fails to show that the pistol was taken from the prosecutor without his knowledge, and the circumstances of the taking do not make it satisfactorily to appear that such taking was done with intent to steal.

(Syllabus by the court.)

Error to City Court of Sandersville; Hon. P. R. Taliaferro, Judge.

James Jackson, convicted of larceny, brings error. Reversed.

J. A. Robson, for the plaintiff in error.

J. E. Hyman, Solicitor, for the State.

LITTLE, J. The plaintiff in error was tried on an accusation in the City Court of Sandersville for the offense of larceny from the person. The accusation charges that he wrongfully and fraudulently took a certain pistol from the person of the prosecutor, Copeland, privately, and without his knowledge, with intent to steal the same. He was convicted, and made a motion for a new trial, on the grounds that the verdict was contrary to law and the evidence, and without law or evidence to support it. The motion being overruled, he excepted.

The contention of counsel for the plaintiff in error is that the evidence fails to show that the accused took the pistol with intent to steal the same, and that, therefore, the verdict is contrary to law and the evidence. Larceny from the person is defined by our Penal Code (section 175) to be "wrongful and fraudulent taking of money, goods, or any article of value, from the person of another, privately, without his knowledge, in any place whatever, with intent to steal the same." It will be noted that this definition varies from that of simple larceny (Pen. Code, § 155), in that in larceny from the person the taking must be privately and without his knowledge. In the case of *Moye v. State*, 65 Ga. 754, this court ruled that the crime could not be completed if the owner of the property had knowledge that it was being taken. Again, no grade or character of larceny is complete unless, accompanying the taking, there is an intent to steal. It is true that as a general proposition the intent may be manifested by the circumstances, but these circumstances must always be sufficient to indicate that the intention to steal existed. This court, in the case of *Patterson v. State*, 85 Ga. 134 (11 S. E. 621, 21 Am. St. Rep. 152), quoted approvingly from a Michigan case (*Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781) a statement that the "general rule is well settled, to which there are few, if any, exceptions, that, when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and

must be found by the jury, as a matter of fact, before a conviction can be had." Mr. Wharton, in the first volume of his Criminal Law (section 885), on authority, states the general rule to be that "taking goods, not with the intention of depriving the owner of his property in them, but with the object of temporarily using them and then returning them, is not larceny;" and in section 886, that "the mere borrowing, without fraudulent intent, is not larceny." Mr. Bishop, in the second volume of his New Criminal Law, § 840 (5), after citing quite a number of cases, declares that, by all opinions, the taking, to be felonious, must be more than a mere trespass, whether careless or intended. And Mr. Clark, in his work of Criminal Law (page 279), while treating on the manner of taking involved in a larceny, declares that though larceny is generally regarded as a secret crime, and conveys the idea of stealth, it is not necessary that the taking should be done secretly. An open taking may constitute the crime, if there is the necessary *animus furandi*, or felonious intent, though the fact that there was no stealth or intended concealment may tend to show the absence of such intent. Quite a number of cases are cited by Mr. Rapalje in note 2, on page 23, in his work on Larceny and Kindred Offenses, which support the proposition that the articles taken must have been taken fraudulently and secretly, with the felonious intent of permanently depriving the owner of them. In section 25 of the same work the author cites authorities which support the proposition he lays down, that the taking of the property of another with the intent of depriving the owner only temporarily of it is not larceny. See, also, *Causey v. State*, 79 Ga. 564 (5 S. E. 121, 11 Am. St. Rep. 447), as to the effect of a public taking.

The evidence of the prosecutor, who was the only witness for the State, is to the following effect: Between the hours of sunset and dark, at a public place (Buffalo Bridge), in Washington County, he was lying down and saw the accused walking towards the place where he was. He had his back to him, and had a pistol in the back pocket of his pants. He felt some one taking his pistol, and, turning, saw Jackson walking away with it in his hand. When he felt the pistol leaving his pocket he endeavored to catch hold of it, but missed it. The pistol was a borrowed one, and belonged to a man by the name of Dudley. The accused returned the pistol to Dudley in about six weeks.

He did not follow the accused when he took the pistol, for the reason that he was afraid he would be shot. There were a number of persons on the ground at the time. He testifies, in the same connection, that the pistol was taken privately and without his knowledge. The latter statement must be discredited, because of his evidence that he saw Jackson walking towards him, and felt some one taking the pistol from his pocket; hence he did have knowledge that it was being taken. The explanation given by the accused, which was not in any way controverted except in the foregoing evidence of the prosecutor, was that a large crowd were at the bridge; that Copeland was lying on the ground with a lot of other persons, and his pistol was sticking out of his hip pocket; that he thought he would have a little fun out of the prosecutor and walked up to him, and took his pistol out, and walked on off with some young ladies with the pistol in his hand; if the prosecutor said anything at the time, he did not hear it; that he had no intention of keeping the pistol, although he did not return it to Dudley, to whom it belonged, as soon as he could have done so; that the pistol was taken in broad open daytime, and that a half dozen men saw him take it and walk off with it.

The jury were not, of course, obliged to believe any part of this statement of the accused. It was, however, a very material point, considering the testimony of the prosecutor, to show the intention of the accused in taking the pistol, and the circumstances that other persons were present and saw him take it, and that it was taken in the open day tended very greatly to show the intention, and the meagerness of the evidence for the State on these points is a significant fact. Indeed, while the statement is fuller as to details, it does not seem to be contradictory of the evidence of the prosecutor, for he does not state that it was dark at the time of the taking, but that it was between sunset and dark. In another particular his evidence would tend to show that other persons saw, or might have seen, the taking; for he states that there were several other persons on the ground. Another significant circumstance which tends to show that the prosecutor did not at the time regard the taking as having been feloniously done is that he did not follow the so-called thief, nor attempt to recover the property, although there were a number of other persons present on whom he could have called for as-

sistance. We are of the opinion that the evidence does not satisfactorily show that the pistol was taken from the person of the prosecutor without his knowledge, nor does it satisfactorily show, under the rules of law to which we have above referred, that the pistol was taken with intent to steal the same. The taking was, of course, a trespass, and wrongful, but, in the absence of the *animus furandi*,—the intent to steal,—the conviction cannot be upheld.

The judgment overruling the motion for a new trial must therefore be reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

LONG v. STATE.

44 Fla. 134—32 So. Rep. 870.

Decided April 1, 1902.

LARCENY: *Hearsay evidence—Bill of sale, when a mortgage—Examination of accused as to his belief—Instructions, given and refused—Taking property openly, a question for the jury—Felonious intent—No larceny without asportation—No physical transfer of the property made.*

1. Declarations of a prosecuting witness as to his ownership of certain cattle, made at a time when he was not in possession thereof, and not made in the defendant's presence, are not admissible against defendant on a trial for the larceny of such cattle.
2. In order to render a bill of sale absolute on its face a mortgage, it must have been executed with the intention or purpose of operating as a security.
3. A charge asserting that, if it was verbally agreed between the parties to the transaction, at the time of execution of an absolute bill of sale of certain cattle, that the vendor should be allowed to redeem or have the cattle back upon payment of a certain sum of money, the transaction constituted a chattel mortgage only, is properly refused, as the facts thus hypothesized are not inconsistent with an absolute sale, in the absence of an intention that the conveyance should be a security.
4. A charge asserting that a chattel mortgage does not operate as a conveyance of the legal title or right of possession is properly refused, where there is evidence tending to show that the mortgagee, by the terms of the instrument, and by a verbal understanding between the parties, was to have possession of the property.
5. The rule announced in *Dean v. State*, 26 South. 638, 41 Fla. 291, 17 Am. St. Rep. 186, that, "where the taking is open, and there is no sub-

sequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence, before a conviction is authorized," is not a rule of law to be given in charge to a jury in prosecutions for larceny, but a presumption of fact, which the jury may apply in proper cases, and which may guide the court, in cases where it is applicable, in determining the sufficiency of evidence to support a verdict of guilty.

6. To constitute larceny, there must exist both a felonious intent and a carrying away of the property, and a charge eliminating either of these features of the offense is improper.
7. Where one person, having no actual or constructive possession of the property of another, points out such property to a third person, and gives the latter a bill of sale therefor, receiving in payment a sum of money, he does not commit larceny, in the absence of some act constituting an asportation of the property.

(Syllabus by the court.)

Error to Criminal Court of Record, Orange County; Hon. Cecil G. Butt, Judge.

James Long, convicted of larceny, brings error. Reversed.

Jones & Jones and *L. D. Browne*, for the plaintiff in error.

William B. Lamar, Attorney General for the State.

PER CURIAM. This cause was referred by the court to two of its commissioners, Messrs. Hocker and Glen, for investigation, who have reported that the judgment ought to be reversed.

Plaintiff in error was tried and convicted in July, 1901, in the Criminal Court of Record of Orange County, upon an information charging the larceny of two cows, the property of William Lancaster. It appears from the evidence that defendant, claiming to own the two cows alleged to have been stolen, which were then in a pasture, went out there with one Douglass, as Douglass claimed, to sell him the cattle, but, as defendant claimed, to procure a loan of \$25 upon the security of a bill of sale for the cattle. Defendant pointed them out to Douglass, and on the same day executed a bill of sale to Douglass, agreeing to allow the cattle to remain in the pasture for 15 days free of charge; and Douglass paid him \$25, as he claims, for the purchase of the cattle, but, as defendant claimed, on the security of a bill of sale. Some weeks afterwards Douglass drove the cattle away, and a few days afterwards Lancaster went to see Douglass about the cattle. The witness Douglass was permitted, over defend-

ant's objections and exceptions, to testify that in the conversation then had between witness and Lancaster the latter claimed to own the cattle. The cattle were at the time in the possession of Douglass, and defendant was not present at the time of the conversation. This testimony, to the effect that Lancaster claimed to own the cattle, was hearsay, and ought to have been excluded on defendant's objection. The question as to Lancaster's ownership was a contested one on the trial, defendant claiming to own them himself, and it was not proper to allow Lancaster's declarations as to his ownership, not made in defendant's presence, and while he was not in possession of the cattle, to be given in evidence. The defendant, as a witness, was asked, concerning the bill of sale above referred to, "Did you understand that bill of sale to be a straight out bill of sale of the cattle or a mortgage?" Upon objection by the State the witness was not permitted to answer. Without undertaking to say whether this particular question was objectionable, its exclusion was immaterial, because in answer to other questions the witness was permitted to state the circumstances attending the execution of the paper, the purpose for which it was executed, and his understanding that the paper was executed as security for a loan of money, and not to evidence an absolute sale.

Defendant moved the court to strike from the evidence the bill of sale executed by him to Douglass. When this motion was made, the bill of sale had not been offered in evidence. At a subsequent stage of the trial the paper was introduced in evidence without objection, and the motion to strike was never renewed.

Exceptions were taken to the refusal to give instructions requested by defendant, as follows: "(1) If you find from the evidence that, although the bill of sale given by defendant to Elisha Douglass of the cattle which defendant is charged with stealing was so given by him, and that, although the said bill of sale purports on its face to be absolute, it was verbally agreed between defendant and Douglass that defendant was to be allowed to redeem or have the cattle back upon payment by him to Douglass of a certain sum of money, you are instructed that the said bill of sale is deemed to be a chattel mortgage only. (2) If you find from the evidence that the said bill of sale was a mortgage, you are instructed that it only conferred a specific

lien on the cattle in favor of Douglass, and did not operate as a conveyance of the legal title or right of possession of the cattle." These instructions were properly refused. The facts stated in the first charge do not necessarily, as a matter of law, make the transaction a mortgage. The facts stated may be entirely consistent with an absolute sale of the property. In order to make the transaction a mortgage, the intention or purpose must be to secure the payment of money. Section 1981, Rev. St. The fact that an absolute purchaser may agree with the seller to resell the property to him for a sum of money agreed upon, or, as expressed in the refused instruction, it may be verbally agreed between the seller and purchaser that the former was to be allowed to have the property back upon payment of a certain sum of money, does not necessarily prove the transaction in reality to be merely the security for money, so as to bring the transaction within the meaning of the statute. If the bill of sale was, under the statute, according to the evidence, in reality a mortgage, yet by some evidence, at least, Douglass, to whom the paper was executed, was, by the terms of the written instrument, and by the verbal understanding between the parties, to have possession of the cattle, which is permissible if so understood between the parties, though the conveyance giving such right of possession be merely a mortgage. Section 1983, Rev. St. The latter clause of the second requested instruction would deny that right, and that instruction was therefore properly refused. The court also refused to give instructions 5 and 6 requested by the defendant, as follows: "(5) Where the taking is open, and there is no subsequent attempt to conceal the property, and no denial, but an avowal, of the taking, a strong presumption arises that there was no felonious intent, which must be repelled by clear and convincing evidence before a conviction is authorized. (6) The openness of the taking, where possession has not been obtained by force or strategem, is a strong circumstance to rebut the inference of a felonious intention." To the refusal to give them exceptions were duly taken.

The fifth requested charge is one of the headnotes in the case of *Dean v. State*, 41 Fla. 291, 26 South. 638, 79 Am. St. Rep. 186. The sole question in that case was whether the evidence was sufficient to sustain the verdict, and the court reached the conclusion that it was not. It appeared from the uncontradicted

evidence certified to the court in that case that the accused took the property alleged to have been stolen—an ox—openly, in the daytime, in the presence and with the assistance of several persons, under a claim of ownership, and led it along the highway to his home; that he subsequently sold it to a party living in the same neighborhood of the real owner; and there was testimony of several witnesses independent of the accused himself that he had raised the ox from a calf, and had continuously owned it. There was no concealment in any way, but an open avowal of possession and ownership. The court did not find any conflict in the evidence as to such matters, nor were there discovered any infirmity or defects in it to rebut the presumption in favor of an innocent intent in the taking of the property. In weighing the testimony the court applied the principle that, where the taking in larceny was open, with no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, a strong presumption arises that there was no felonious intent. It was not in terms said that this was a presumption of law under the facts stated, but the last clause in the headnote embodied in the request would seem to indicate that it might be so regarded. The principle stated was taken from *McMullen v. State* 53 Ala. 531, and was used argumentatively by this court in discussing the facts before it. In cases of larceny the question of the intent with which the accused took the property is always one of fact primarily to be decided by a jury, subject to review by the court. As we understand the decisions in Alabama, this is the rule there, and the question of intent as to the taking is one of fact, in all cases for the jury. It was held in *Talbert v. State*, 121 Ala. 33, 25 South. 690, that such question should be submitted to them, although the taking was open, in the presence of the owner of the property and others, and there was no subsequent denial or concealment. See, also, *State v. Powell*, 103 N. C. 424, 9 S. E. 627, 4 L. R. A. 291, 14 Am. St. Rep. 821. Where the taking is open, in the presence of others, not amounting to a robbery, and there is no concealment, or, in short, where the testimony as to the taking, standing alone, raises a presumption of fact in favor of an innocent taking, and there is nothing in it from which a jury may legitimately infer a felonious purpose, then a verdict against the accused cannot be sustained, and it would be the duty of the court to set it aside. The principle,

however, announced in the headnote in the *Dean Case*, upon which this court acted in determining the sufficiency of the evidence then before it, must not be regarded as stating a principle of law which an accused has a right to have charged in his favor; and, if such is its effect, it must be limited. Where there is conflict in the evidence as to the intent with which the property was taken, or it is of such a character as to legitimately authorize an inference of a felonious purpose, then the matter should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from any portion of the testimony. As stated, the principle is not one of law, but of fact, arising from the evidence, and under the facts of this case the court was correct in refusing to charge the jury as requested by the accused. What is said disposes, also, of the sixth request.

Exceptions were taken to portions of the charge of the court. In the second paragraph the court stated, "The defendant is charged with the larceny of two cows, the property of William Lancaster." It is argued here that this language assumes that the cows belonged to Lancaster,—a matter in dispute upon the trial. We do not think the criticism is well founded. The language objected to simply states the charge upon which defendant was being tried, and does not assume Lancaster's ownership of the cows. In the next paragraph the jury were distinctly told that it is incumbent upon the State to prove the property taken to be the property of William Lancaster. Paragraphs 4, 5 and 6 read as follows: "(4) The court instructs you that if you find from the evidence that the defendant, James Long, appropriated the two cows to his own benefit; that he sold them, either by a straight bill of sale or by a conditional sale, without the knowledge or consent of the owner, and received a money consideration therefor,—he would be guilty. (5) The court instructs you that if the defendant, James Long, pointed out the cows to Douglass, and gave him a bill of sale for same, and received in payment the sum of twenty-five dollars, that would be a delivery. (6) The court instructs you that if the two cows were not the property of James Long, and the said Long, knowing the same not to be his property, delivered the same to Douglass, either upon mortgage or sale outright, he would be guilty of larceny."

The fourth and fifth paragraphs are assigned as error. Paragraph 4 is erroneous, because it omits two essential elements in larceny, viz., the carrying away of the property, and the felonious intent. Defendant might have done all the acts mentioned in this paragraph with no felonious intent, in which event he would not be guilty of larceny. *Long v. State*, 11 Fla. 295; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417. Paragraph 5 asserts that certain facts stated would constitute a delivery of the cattle by defendant to Douglass, and paragraph 6 asserts that, if the cattle were delivered to Douglass by defendant, either upon mortgage or sale outright, and the cattle were not the property of defendant, and defendant knew they were not his property, he would be guilty of larceny. While the fifth and sixth paragraphs were both excepted to, the fifth only is assigned as error. As the fifth gives the facts that the court holds would constitute the delivery of the property mentioned in the sixth, it will be not only convenient, but necessary, to consider them together. These instructions, read together, authorize a conviction for larceny where there has been no asportation of the property. Where one person, having no actual or constructive possession of another's property, points out that property to a third person, and gives the latter a bill of sale for the property, receiving in payment a sum of money, but there is no act constituting an asportation or carrying away of the property, no larceny is committed, because in larceny the asportation is a necessary element of the offense. *Mizell v. State*, 38 Fla. 20, 20 South. 769. No doubt, an actual manual delivery of property would constitute an asportation; but a sale and conveyance by bill of sale and a pointing out of the property, where no actual delivery is made, and no further acts done which in law would constitute an asportation, would not make the offense of larceny complete, though for civil purposes the title to the property may pass by such transaction. These instructions authorize the jury to convict of larceny without proof of an asportation of the property, and are erroneous in law, and misleading upon the facts. We do not wish to be understood as intimating an opinion that the jury could not have found from the evidence that the property had been taken and carried away, but as holding that the facts stated in the instructions would not constitute an asportation.

Other assignments of error need not be considered, as they

need not necessarily arise upon another trial, except the one questioning the ruling denying the motion for a new trial upon the ground that the evidence is not sufficient to support the verdict; and as to that, if properly presented, in view of the fact that another trial is to be had, it is not proper to express an opinion at this time.

The judgment of the court below is reversed, and a new trial granted.

LANE V. STATE.

113 Ga. 1040—39 S. E. Rep. 463.

Decided July 22, 1901.

LARCENY: *No evidence of value—Ownership—Trespass.*

Even if the accused, under the facts as they appear in the record, could be lawfully convicted of the offense of larceny, the judge erred in not granting a new trial in the present case, for the reason that there was no proof that the article alleged to have been stolen was of any value.

(Syllabus by the court.)

It is neither a trespass nor a larceny for a cropper, who has an interest in a crop, to take and sell it without the consent of the landlord. (Additional syllabus; by J. F. G.)

Error to City Court of Dublin.

Joe Lane, convicted of larceny, brings error. Reversed.

Howard & Armistead, for the plaintiff in error.

F. G. Corker, Solicitor, and *Griner & Williams*, for the State.

COBB, J. The accused was placed upon trial upon an indictment charging him with the offense of simple larceny, and was convicted. His motion for a new trial having been overruled, he excepted. Upon an examination of the brief of evidence which is contained in the record, it does not appear that there was any evidence showing the value of the article alleged to have been stolen, or that it was of any value. For this reason the conviction was unauthorized, and the judge should have granted a new trial. *Hawkins v. State* 95 Ga. 458, 20 S. E. 217; *Smith v. State*, 95 Ga. 460, 21 S. E. 45; *May v. State*, 111 Ga. 840, 36 S. E. 222.

It does not distinctly appear from the evidence for the State exactly what was the relation that existed between the prosecutor and the accused, so far as the property which was alleged to have been the subject of the larceny was concerned, but from the statement of the accused it clearly appears that the relation between them was that of landlord and cropper. If this was the true relation existing between them, the accused would not be guilty of simple larceny, even if it be true that he converted a portion of the property to his own use without the consent of the landlord.

In *Padgett v. State*, 81 Ga. 466, 8 S. E. 445, it was held that it was not a trespass upon the part of a cropper to remove a portion of the crop from the premises, and sell the same, without having settled with the landlord, and that for this reason a cropper could not be indicted under section 4440 of the Code of 1882 (Pen. Code, § 219), declaring certain acts of trespass to be indictable; among them being "the taking and carrying away * * * any article, or property of any value whatever, from the land * * * of another, without the consent of the owner."

The taking which is necessary to complete the offense of larceny must be a trespass against the owner's possession. 18 Am. & Eng. Enc. Law (2d Ed.) p. 469. See, also, *Beall v. State*, 68 Ga. 820. The conversion by a cropper of a portion of the crop to his own use is, therefore, neither larceny nor an indictable trespass under our Code, though such conduct on the part of a cropper will render him indictable under the statute now contained in Pen. Code, § 680. See, also, *Hackney v. State*, 101 Ga. 516, 28 S. E. 1007.

Judgment reversed.

All the justices concurring.

STRINGER V. STATE.

135 Ala. 60—33 So. Rep. 685

Decided February 12, 1903.

LARCENY: *Total failure to prove the corpus delicti.*

The proof simply showing that the accused had possession of the alleged stolen property and that accusations of stealing it were made against him in his presence and denied by him, the court should have directed the jury to acquit.

Appeal from City Court of Gadsden; Hon. John H. Disque, Judge.

George Stringer convicted of larceny from the person, appeals. Reversed.

P. E. Culli, for the appellant.

Chas. G. Brown, Attorney General for the State.

TYSON, J. The offense alleged against the defendant, and for which he was tried and convicted, was a felony. Section 5049 of Code.

The only evidence offered by the State tending to incriminate him was the possession of the money charged to have been stolen, and certain accusations made against him in his presence that he committed the larceny as alleged in the indictment, which he denied. There was no proof, independent of that afforded by this evidence, of the *corpus delicti*. On the authority of *Smith v. The State*, 133 Ala. 145, 31 South. 806, and *Matthews v. The State*, 55 Ala. 187, we are constrained to hold that this evidence was not sufficient to support a conviction, and that the general affirmative charge requested by defendant should have been given.

Reversed and remanded.

NOTE (By J. F. G.).—At first thought, the principle involved in the above opinion may seem too plain for space in these Reports; but plain as it may be, it has been necessary for more than one conviction to be reversed for substantially the same reckless disregard of fundamental principles of criminal law. In *State v. Pugh* 131 N. C. 807, 42 S. E. Rep. 963, decided December 16, 1902, the Supreme Court of North Carolina announced the following opinion:

CLARK, J. The defendant was convicted of the larceny of a suit of clothes, and sentenced to 10 years in the State's prison. The only evidence

was that a sailor accused the defendant of having stolen his suit of clothes out of a bag which the defendant was carrying for him, and the defendant denied the charge when made. The judge should have charged the jury, as requested, that there was no evidence. The sailor was not at the trial, nor was there any witness who testified to any circumstance bearing upon the alleged commission of the offense. The remark of the sailor was hearsay, and was only competent as a *quasi* admission if the defendant had failed to deny the charge. This the defendant did promptly when so charged, and also went upon the stand and denied it at the trial. There was not the *scintilla* of any evidence against him.

Error.

If the cases are correctly stated in the above opinions, it would seem that Judges Disque and Timberlake, the trial judges in the courts below, followed a rule so often adopted by judges in trials of criminal cases; that, the doctrines, of reasonable doubt and of the presumption of innocence, are humane doctrines which should apply to every case, *except the one on trial*; or it may be, as frequently has been done, they speculated on the supposed inability of the accused to bring the case before a court of review.

Mr. Justice Tyson who wrote the above opinion in the case of *Stringer v. State* also wrote the opinion in *Smith v. State* cited in the *Stringer Case*. In the *Smith Case* the conviction was affirmed, because the court held, that there was sufficient proof of the *corpus delicti*; but in the opinion the court said:

"It must now be regarded as settled in this State that the unexplained possession of property recently stolen does not, as matter of law, raise a presumption of guilt from the circumstance. Nor does the unexplained possession by one person of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is a thief. Additional evidence is necessary to establish the *corpus delicti*. Unless the jury are satisfied beyond a reasonable doubt that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief. *Orr v. State* 109 Ala. 35, 18 South. 142; *Thomas v. State*, 109 Ala. 25, 19 South 403. Proof of a charge, in criminal causes, involves the proof of two distinct propositions—First, that the act itself was done; and secondly, that it was done by the person charged, and by none other,—in other words, proof of the *corpus delicti* and of the identity of the prisoner. *Winslow v. The State*, 76 Ala. 47. It is undoubtedly true that both of these essential propositions are generally for the determination of the jury, and both must be proved beyond a reasonable doubt. But where there is no proof of the *corpus delicti*,—no testimony tending in the remotest degree to prove that the property charged to have been stolen was in fact stolen, no larceny shown to have been committed,—then there can be no conviction of the prisoner, should the goods described in the indictment charged to have been stolen be found in his possession, though no explanation as to how he came by them be given by him, or,

if given, is entirely unsatisfactory. In such case, the evidence is not *prima facie* sufficient to establish the *corpus delicti*, and the court should not allow the introduction of evidence of possession by the prisoner of the goods charged in the indictment to have been stolen. In other words, until the State has by positive or circumstantial evidence shown a *prima facie* larceny of the goods, which is for the determination of the court, solely for the purpose of determining the admissibility of evidence tending to connect the prisoner with the commission of the offense, the prosecution is not entitled to introduce evidence of possession by defendant of the goods alleged to have been stolen. In this respect, the case would not be different from the one where an extrajudicial confession is sought to be introduced against one charged with a felony; or where there is an entire want of evidence of the *corpus delicti* except statements made by the prisoner or unexplained possession of the goods alleged to have been stolen, the court should direct the jury to acquit the prisoner. On the other hand, if the evidence affords an inference of the larceny of the goods, then the question of its sufficiency is one for the jury, and it becomes their province to determine whether the *corpus delicti* has been proven. In such case, evidence of possession by the prisoner of goods of the same kind as those charged to have been stolen is competent, and the jury must determine upon the entire evidence, not only the question of the doing of the act, but whether committed by the defendant. Indeed the *corpus delicti* must often be proved by circumstances."

While considering this subject it may be interesting to notice the following case:

AARON V. STATE.

116. Ga. 582—42 S. E. Rep. 708.

Decided November 13, 1902.

1. The evidence not being sufficient to establish beyond a reasonable doubt either that a larceny had been committed, or that, if committed, the accused was the perpetrator, it was error to overrule a motion for a new trial based upon the ground that the judgment of conviction was contrary to the evidence.

(Syllabus by the court.)

Error to the City Court of Americus; Hon. C. R. Crisp, Judge.

Richard Aaron convicted of larceny, brings error. Reversed.

J. R. Williams for the plaintiff in error.

F. A. Hooper, Solicitor General for the State.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., absent on account of sickness, and CHANDLER, J. not presiding.

Quære: Which was the most *crisp*,—the judge of the court below or the opinion of the court above? (J. F. G.)

JASPER v. STATE.

Texas, Court of Criminal Appeals—61 S. W. Rep. 489.

Decided March 6, 1901.

LARCENY—INDICTMENT—INSTRUCTIONS.

1. Indictment, the charging part of which appears in the opinion held sufficient.
2. The court approves the following instruction: "If you believe from the evidence that the defendant had in her possession, at the time testified about, money which belonged to the defendant, but that she came into such possession by picking same up from the ground, or from some place other than from the person of the said Frank Moody, then you will acquit her; and, unless you are satisfied beyond a reasonable doubt that such was not the case, then you will acquit."
3. It was the duty of the court to instruct the jury, that evidence of other offenses had no bearing on the main case; but was only to be considered in weighing defendant's testimony.
4. It was not necessary for the court to mention the name of the defendant in the instructions; nor to explain the meaning of the word "defendant" or the abbreviation, "deft."
5. No necessity existed for a charge on circumstantial evidence.

Appeal from District Court, Tarrant County; Hon. W. D. Harris, Judge.

Lucile Jasper, alias Lucile Williams, convicted of theft, appeals. Affirmed.

D. E. Simmons, Acting Assistant Attorney General, for the State.

BROOKS, J. Appellant was convicted of theft from the person, and her punishment assessed at two years' confinement in the penitentiary.

Appellant made a motion to quash the indictment. The charging part of the indictment is as follows: "* * * That Lucile Williams, * * * on the 4th day of April, 1900, did then and there unlawfully, fraudulently, and privately take from the person and possession of one Frank Moody eighty dollars in money, of the value of eighty dollars, the same being then and there the corporeal personal property of said Frank Moody, without the knowledge and without the consent of said Frank Moody, and so suddenly as not to allow time for resistance, with the intent

then and there on the part of her, the said Lucile Jasper, alias Lucile Williams, to deprive said Frank Moody, the owner thereof, of the value thereof, and to appropriate it to the use and benefit of her, the said Lucile Jasper, alias Lucile Williams," etc. We think the indictment is sufficient. *Green v. State*, 28 Tex. App. 495, 13 S. W. 784.

Appellant insists, as the second ground of her motion for new trial, that the court erred in the following portion of the charge: "If you believe from the evidence that defendant had in her possession, at the time testified about, money which belonged to the defendant, but that she came into such possession by picking same up from the ground, or from some place other than the person of the said Frank Moody, then you will acquit her; and, unless you are satisfied beyond a reasonable doubt that such was not the case, then you will acquit." Appellant insists this charge is erroneous, in that the same requires the jury to believe, before they can acquit defendant, that they must believe she had money in her possession belonging to herself, which she had acquired by other means than from Frank Moody; and because the same is misleading, and is not the law applicable to this case. We think the charge of the court is correct, and is in entire accord with the facts of this case.

Appellant also excepts to the following charge: "The evidence brought out on cross examination of defendant with reference to former charges against defendant can be considered by the jury only as affecting—if you believe the same does affect—her credibility as a witness in the case, and not as showing, nor tending to show, that defendant committed the offense for which she is now on trial." Appellant objects on the ground that the same is on the weight of the evidence, and singles out and calls undue attention to particular evidence of defendant. It was the imperative duty of the court to give this charge, and not to have done so would have been error.

The fourth ground of his motion is that the charge nowhere, except in the style of the case, mentions the name of the defendant, and nowhere in the body of the charge tells the jury who is meant by the term or appellation of "deft," and "defendant," and nowhere requires them to believe that Lucile Jasper did anything, and is insufficient and confusing for this

reason. An inspection of the charge shows this exception to be hypercritical. It is not required of the trial court to name the defendant, but he may designate her as the defendant.

Appellant's fifth ground is that the court erred in failing to charge on circumstantial evidence. In this there was no error.

We have carefully reviewed appellant's assignments of error, and none of them are well taken. There being no error in the record, the judgment is affirmed.

BULLARD V. STATE.

Texas, Court of Criminal Appeals—53 S. W. Rep. 637.

Decided November 8, 1899.

LARCENY: *Taking property from a constable under a claim of right—Necessity of an instruction on the doctrine of criminal intent etc.*

1. When an officer has levied on property as the property of a third person, the retaking and selling of such property by the accused, is no more fraudulent, than had he taken it from a private individual.
2. If the accused took the property under a belief that it was his property, and that he had a right to take it, the taking is no larceny.
3. The court should have instructed the jury on the doctrine of criminal intent and good faith.

Appeal from Hunt County Court; Hon. R. D. Thompson, Judge.

R. M. Bullard convicted of larceny, appeals. Reversed.

J. G. Mathews, for the appellant.

Robert A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of a bale of cotton from the possession of J. E. Langford, constable of precinct No. 5. Langford, it is alleged, had possession of this property by reason of a levy under a writ of execution issued from the county court of Hunt county. Langford testified he held a writ of execution in a case in which Lindley was plaintiff and Sam Speed, Robert Speed, Addie Speed, and N. Pitts were defendants, and in which case judgment had been rendered in favor of Lindley against said parties. He went to the gin of Will Roan, and there found a wagon load of seed cotton claimed by Speed; that, after levying upon said cotton, Speed drove it under the suction pipe. Witness stayed about

the gin for about 15 minutes, and when he got ready to leave told Speed to let the cotton remain there, and obtained from Will Roan, the proprietor of the gin, the gin number of the bale, which was No. 238. He was there in a buggy, and could not take the cotton with him. He further testified that as he got in his buggy defendant claimed the cotton. He informed appellant that Speed claimed the cotton, and that he had levied on same as Speed's, and told Bullard to let it alone. He also informed appellant that the law provided a remedy, and he must resort to it. The return on the execution states that it was executed on the 24th day of September by levying on a lot of seed cotton, gin number to be 238; that he had levied on the same as the property of Robert Speed, and in favor of Jahu Lindley, and left it in the care of Will Roan. Appellant testified the cotton was his; that it was the fourth bale gathered by Speed, and by Speed transferred to him in the field before hauling it to the gin, and that he secured Speed's service in so hauling it because he was not well; that, after the cotton was ginned, he took it away on the same day, and, subsequent to the levy by Langford, sold it, and paid the proceeds to Battle; that the cotton was received by appellant as rent; that he believed it was his when he took it, and still thinks so. He states he was aware of the levy, as he had gone to the gin with Speed; that he drove the cotton on the scales; that the cotton was weighed in his name; that Speed first told him the cotton had been levied on. Robert Speed testified that he turned this cotton over to appellant, as rent on a note, the day before the levy was made. Appellant had rented the land on which the cotton was raised from J. F. Battle, and had subrented it to Speed. Blair, the bookkeeper of Roan, testified that he weighed the cotton; that Speed drove it on and off the scales, and it was weighed in the name of Speed. This is the substance of the testimony.

The State's theory of the case upon the trial was that appellant had taken the cotton from the possession of the officer under the levy, and therefore was guilty of theft. If, in fact, Roan was in possession of it, as testified by Langford, and as shown by his return, there was a variance between the allegation and proof. Again it does not follow that, because a party

may take his own cotton from an officer, this would necessarily be theft. Theft is the "fraudulent taking" of personal property. If Langford had held the property independent of his official position, and the property had in fact belonged to appellant, and not to Speed, and the taking was in good faith, believing he had a right to take it, it would not be theft, for this would not have been a fraudulent taking. We are not aware of any law that makes the possession of an officer of any higher grade than the possession of an individual; nor is the taking any more fraudulent from an officer than from an individual. If appellant took the property under the belief that he had a right to take it, and that it was his property, the question of good faith was at once suggested, and the court erred in not charging this phase of the law as embodied in special instructions asked by appellant. In theft cases under our law the fraudulent taking is a necessary element. No man can be guilty of theft, under our statute, who takes his own property, unless that taking is fraudulent. This, of course, is always a question of fact to be submitted to the jury under appropriate instructions. Because the court failed to give appellant's requested instructions in this regard, and having failed to so instruct the jury in the general charge, the judgment is reversed, and the cause remanded.

MARSHALL v. STATE.

71 Ark, 415—75 S. W. Rep. 584.

Decided June 6, 1903.

LARCENY—INDICTMENT—VARIANCE—MISCONDUCT OF COUNSEL: *Statutory indictment—Fatal variance as to unnecessary description of money—Misconduct of prosecuting attorney in his opening statement and offers of prejudicial testimony.*

1. Under the statutes of Arkansas, it is sufficient in an indictment to describe stolen money as: "gold, silver and paper money."
2. An unnecessarily minute description of stolen money in an indictment, requires proof corresponding with the description.
3. It is improper for a prosecuting attorney in his opening statement to anticipate the line of defense, and by his statement to get before the jury, matter not admissible in evidence.
4. In the present instance, the opening statement of the prosecuting attor-

ney was so highly prejudicial, that it was not even cured by the charge of the court.

Appeal from Circuit Court, Sebastian County; Hon. Styles F. Rowe, Judge.

E. J. Marshall and another convicted of grand larceny, appeal. Reversed.

The offense was charged in the indictment as follows:—"The grand jury of Sebastian County, for the Ft. Smith District thereof, in the name and by the authority of the State of Arkansas, accuse the defendants, E. J. Marshall and Ed Burdett, of the crime of grand larceny, committed as follows, to wit: The said defendants, in the county and district aforesaid, on the 15th day of October, 1902, one pocketbook, of the value of of \$1, thirty-five dollars, gold, silver, and paper money of the United States, of the value of \$35, all the property of Jim Dyer, feloniously did steal, take and carry away, against the peace and dignity of the State of Arkansas."

Section 1717 of Sand. & H. Dig. reads as follows:

"In all prosecutions for the unlawful taking of money by larceny, embezzlement or otherwise, it shall not be necessary to particularly describe in the indictment the kind of money taken or obtained, further than to allege gold, silver or paper money; and a general allegation in the indictment, and proof of the amount of money taken shall be sufficient."

The defendants demurred to the indictment, claiming that the description of the money was insufficient. The demurrer was overruled and they excepted.

In his opening statement, the prosecuting attorney told the jury, that he would prove that defendants had the reputation in New York, St. Louis, New Orleans, Chicago and other cities, of being professional thieves and pick pockets. This statement was immediately objected to on the ground that such evidence was only admissible to contradict the defendants, and not as substantive evidence, which objection was overruled; the court stating that he would control that, and, if it became inadmissible, that he would so advise the jury. The prosecuting attorney then proceeded, and stated that he would prove that the defendants' pictures were in the rogues' gallery at

St. Louis; and that the defendant Marshall had served a term in the penitentiary. To all of which the defendants objected.

John Fuller, Chief of Police, testified: that he had made an investigation of police records in St. Louis and other cities, as to the reputation of the defendants. The court ruled this testimony out. The witness was asked if he had seen pictures of the defendants. To which he answered that he had the pictures in his office. The prosecuting attorney told him to go and get them. Defendants objected to the question and the methods of the prosecuting attorney. The court said he would exclude the evidence. Defendants also entered an exception, on the ground that both the court and the prosecuting attorney knew that the evidence was inadmissible; and that taken in connection with the opening statement, its effect was irremediable. The court stated that the evidence was not admissible, that it would be excluded, and so told the jury.

By the testimony it appeared that between thirty-four and thirty-six dollars were stolen; but there was no proof as to the description of the money. Defendants asked the court to instruct the jury, that, "the proof of the amount of money taken \$34 or \$36, was not sufficient to sustain a conviction;" which request was refused.

Mechem & Bryant, for the appellants.

Geo. W. Murphy, Attorney General, for the State.

Wood, J. The indictment was sufficient. Sand. & H. Dig. § 1717 *State v. Boyce*, 65 Ark. 82, 44 S. W. 1043.

It was not necessary, under section 1717, *supra*, to particularly describe in the indictment the kind of money taken, further than gold, silver or paper money. But inasmuch as the money was described as "of the United States," it was made a part of the description, and the prosecuting attorney should have proved it; also that it was "gold, silver, and paper money," as alleged. This was not done, and the court should have given the instruction asked for by the appellants. *Wilburn v. State*, 60 Ark. 141, 29 S. W. 149; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *Hamilton v. State*, 60 Ind. 193, 28 Am. Rep. 653; *Watson v. State*, 64 Ga. 61.

The object and scope of opening statements, under the

statute are discussed in *McFalls v. State*, 66 Ark. 16, 48 S. W. 492. According to the doctrine there announced, and the authorities generally, the statement of the prosecuting attorney in this case was highly prejudicial—so much so, that we do not think the charge of the court could have eliminated the poison from the minds of the jury.

He is not supposed to know what the evidence for the defense will be. *Ayrault v. Chamberlain*, 33 Bar. 229.

Judge Graves, in *Scripps v. Reilly*, 35 Mich. 371, 24 Am. Rep. 575, says:

"The cases unite in substantially denying the right to get before the jury a detail of the testimony expected to be offered, and especially any not positively entitled to be introduced, and deny the right to use it as a cover for any topics not fairly pertinent."

For the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

WALTHOUR V. STATE.

114 Ga. 75—39 S. E. Rep. 872.

Decided November 6, 1901.

LARCENY—INDICTMENT: *Insufficient description of stolen property.*

A bill of indictment, charging one with simple larceny, in which the property alleged to have been stolen, as therein set out, was "a lot of cord wood," of a stated value, belonging to named persons, should have been quashed on demurrer for want of a sufficient description of the property alleged to have been stolen.

(Syllabus by the Court.)

Error to City Court of Floyd County; Hon. J. H. Reece, Judge.

John and Jiles Walthour were jointly indicted for larceny. Jiles was acquitted. John was convicted, and brings error. Reversed.

C. E. Carpenter, for the plaintiff in error.

Moses Wright, Solicitor General for the State.

LITTLE, J. John and Jiles Walthour were indicted by the grand jury of Floyd County for the offense of simple larceny.

On the charge thus preferred they were tried at the September term, 1901, of the City Court of Floyd County, and a verdict of guilty returned as to John Walthour, and a verdict of not guilty as to Jiles. The defendants filed a demurrer on the following grounds: (1) Because the cord wood alleged to have been stolen is not described with that certainty required by law; (2) because the indictment did not disclose what kind of cord wood was stolen; and (3) because the indictment did not describe the number of cords, or amount of cords, and did not charge the theft of any specified number of cords of wood, or of any specified amount of wood. This demurrer was overruled, and John Walthour excepted. Walthour also filed a motion for a new trial on the general grounds, which was heard and overruled by the trial judge, and the accused excepted to the order overruling his motion. As we think the judge erred in not sustaining the demurrer, it will not be necessary to consider the exceptions based upon the overruling of the motion. The indictment charged the defendants with stealing "a lot of cord wood" of the personal goods of certain named persons, "of the value of ten dollars," and the sole question raised by the demurrer is whether this description of the property alleged to have been stolen is sufficient to meet the requirements of the law.

When the subject matter of a larceny is horses, cows, or hogs, the Penal Code prescribes certain elements of description, but in the case of other personal chattels the rule of the common law prevails. Mr. Wharton, in his work on Criminal Pleading and Practice, states the rule thus: "When, as in larceny, * * * personal chattels are the subject of an offense, they must be described specifically by the names usually appropriated to them, and the number and value of each species or particular kind of goods stated." Section 206. In the case of *Davis v. State*, 40 Ga. 229, Warner, J., quotes this principle from Archb. Cr. Pl., in almost the identical words, and states that the principle of the common law is still of force in this State. See, in this connection, Rap. Larceny, § 75; 2 Bish. Cr. Proc. § 699. Mr. Bishop, in his work just cited, states the object of the description to be "to individualize the transaction, and enable the court to see that they are, in law, the subjects of larceny.

* * * The description should be simply such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge." See *Sanders v. State*, 86 Ga. 724, 12 S. E. 1058, where this author's rule is quoted with approval. Mr. Wharton, in his work above quoted (section 208), further says: "There must be such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded." Still another reason given why the description should be definite is that a judgment may be pleaded in bar of a subsequent prosecution for the same offense. 12 Enc. Pl. & Prac. 979, and cases cited.

Webster defines "lot" to mean "a great quantity or number; a great deal." No description could be more indefinite than "a great quantity" or "a great deal of cord wood." Certainly, the property alleged to have been stolen is not by these words "described specifically." Nor does this description "individualize" the transaction, but, on the contrary, it leaves it indefinite. Nor does it "reasonably inform" the defendant of the instance meant, or "put him in a position to make the needful preparations to meet the charge." What charge could be made more general than is embraced in the language, "a lot of cord wood," in Floyd County, belonging to named persons? Surely, such description did not give the defendant or the jury any definite information as to what he was charged with stealing. The indictment should also so sufficiently identify the property alleged to have been stolen that a finding thereon could be pleaded in bar of a subsequent prosecution for the same offense. A verdict under the charge in this indictment might not, so far as the description of the property therein described is concerned, be any protection to a subsequent prosecution for a larceny of a given quantity of cord wood.

Being of opinion that the indictment did not sufficiently identify and describe the property alleged to have been stolen, so as to meet the requirements of the law, the judgment overruling the demurrer is reversed. All the justices concurring.

STATE v. WHORTON.

25 Mont. 11—63 Pac. Rep. 627.

Decided January 21 1901.

LARCENY: Insufficiency of the evidence—Inartistic instruction.

1. It was shown on behalf of the State: that on the day of the alleged crime, the defendant and the prosecuting witness, George Pulliam were gambling together in a saloon and that Pulliam exhibited several twenty dollar gold pieces; that on the night of the same day Pulliam's leg was injured in a scuffle and he was taken to a hospital; the defendant riding in the wagon with Pulliam and a surgeon, assisting the surgeon; that at the hospital the defendant asked Pulliam for money "to eat on" and was told by Pulliam to wait until he got over his pain; that defendant continued to be "pretty handy" until the leg was set; that Pulliam had two twenty dollar gold pieces in his mackinaw pocket and one twenty dollar gold piece in his purse; that about half an hour after his leg was set, he missed the two twenty dollar gold pieces; that two or three days afterwards the defendant was seen to have two twenty dollar gold pieces and several bills, although the day before the accident he claimed to be without money. Held,—that this evidence did not raise more than a suspicion of guilt and was not sufficient to sustain a conviction.
2. An inartistic instruction criticised.

Appeal from District Court, Choteau County; Hon. Dudley Du Bose, Judge.

Ben Whorton convicted of grand larceny, appeals. Reversed.

Wm. G. Downing, for the appellant.

James Donovan, Attorney General, for the State.

MILBURN, J. The defendant, Ben Whorton, was tried in the District Court of Choteau County on the 24th day of February, 1900, upon an information charging him with the crime of grand larceny, in that, as it was alleged, he did feloniously steal, take, and carry away from the person of one George Pulliam two \$20 gold pieces, coin of the United States, of the value of \$20 each, the property of the said George Pulliam.

The record recites that the defendant was duly arraigned, and that, it appearing to the court that he was without means and without counsel, the court assigned counsel to defend him; that thereafter, it appearing that the court had been misinformed as to the poverty of the defendant, the court revoked its

order assigning counsel; that, as appears from the record, the case was on February 23d set for trial; that, the cause coming up for trial on the 24th, the defendant elected to go to trial without counsel, and, the jury being duly impaneled and sworn, the cause proceeded to trial, and, being submitted to the jury, the defendant was convicted, and sentenced to a term of eight years in the State Prison.

The defendant having employed counsel after conviction, a motion for a new trial was duly made, heard, and denied, and an appeal taken from the judgment and the order denying such new trial.

The points relied upon by counsel in his brief and argument are as follows: (1) That the verdict is contrary to the law and evidence; (2) that the defendant was not arraigned as required by law; (3) that the defendant was not represented by counsel at the trial; and (4) that instruction No. 7 was against the law.

This court is of the opinion that the verdict of guilty is not supported by the evidence. Without considering the evidence which is favorable to the defendant, but taking into consideration that only which might tend to prove his guilt, it appears therefrom that on the day of the alleged crime the prosecuting witness, George Pulliam, and the defendant had been in a saloon together at Fort Benton, where the defendant had been "hanging around" Pulliam, and where they had been gambling together, and where the prosecuting witness exhibited certain \$20 gold pieces and other money to several persons, including the defendant; that in the night of the same day the prosecuting witness engaged in a scuffle with some one not the defendant, severely injuring his leg, so that it was necessary to take him to the hospital, and that he was carried in a wagon which had a seat running lengthwise on each side thereof; that defendant went with the surgeon and the prosecuting witness, holding the head and shoulders of the latter while the doctor held the foot and ankle of the injured man; that, arriving at the hospital, the doctor went to the building to inform the nurse, and while he was gone the defendant asked the prosecuting witness to give him some money "to eat on;" that the prosecuting witness said that he would give him some money after he got over his pain; that defendant was "pretty handy there" in the room until

the leg was set; that the prosecuting witness had two \$20 gold pieces loose in the pocket of his mackinaw, and one \$20 gold piece in his purse besides; that the prosecuting witness found his two \$20 gold pieces were missing and gone about half an hour after his leg was set at the hospital; that two or three days thereafter the defendant was seen to have "a lot of bills" and two \$20 gold pieces, which he was "flourishing around;" and that on the day of the accident, and before, defendant had been heard to make statements showing that he was without money. These appear to be all of the incriminating facts.

The court is of the opinion that this evidence does not raise more than a suspicion of the alleged guilt of the defendant, and that the defendant should not have been convicted thereon.

Instruction No. 7, complained of, is as follows, to wit: "In this case there is no allegation in the information that the property was in excess of fifty dollars; therefore it must have been taken from the person of the said George Pulliam, or else the defendant must be found not guilty." When read with the instructions defining grand larceny, instruction No. 7 correctly states the law, but is not, perhaps, a model as to the style of language used to express the idea intended to be conveyed to the jury, and upon a new trial may well be remodeled by the court.

As the other questions raised are not likely to arise upon a new trial, they are not passed upon in this opinion.

The judgment and order appealed from are therefore reversed, and the cause is remanded for a new trial.

BRANTLY, C. J., and PIGOTT, J., concur.

DOBSON v. STATE.

61 Neb. 584—85 N. W. Rep. 843.

Decided April 10, 1901.

LARCENY—INSTRUCTIONS: *Felonious intent at time of taking—General instruction omitting one element, not cured by other instruction.*

1. An instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous, and is not cured by another instruction, which covers the point.

2. To constitute larceny, there must have existed a felonious intent at the time of the taking.
(Syllabus by the Court.)

Error to District Court, Cherry County; Hon. William H. Westover, Judge.

Alexander Dobson, convicted of larceny, brings error. Reversed.

Hamer & Hamer and *J. Wesley Tucker*, for the plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown*, Deputy Attorney General, and *M. F. Harrington*, for the State.

NORVAL, C. J.

Alexander Dobson was prosecuted in the District Court of Cherry County for stealing a calf. The judgment of conviction is here for review.

Among the numerous errors assigned is one relating to the giving of the fifth instruction, a copy of which follows: "You are instructed that in this case, if you are convinced by the evidence beyond a reasonable doubt that the defendant, on or about the 30th day of November, 1899, in Cherry County, Nebraska, took the calf described in the information from the range or prairie at or near his home in Cherry County, Nebraska, into his possession, and on or about said time sold and delivered the same to one Jerry Kelley, with the intention then and there to convert said calf to his own use, and to permanently deprive the owner thereof of his said property, then you are instructed that such action on his part would constitute a larceny of said calf, within the meaning of the laws of this State." By this instruction the court attempted to cover the whole case. If it omitted an essential element of larceny, the giving it was error. *Barnes v. State*, 40 Neb. 545, 59 N. W. 125; *McAleer v. State*, 46 Neb. 116, 64 N. W. 358; *Runge v. Brown* 23 Neb. 817, 37 N. W. 660; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb. 194, 42 N. W. 11; *Bowie v. Spaid*, 26 Neb. 635, 42 N. W. 700; *Thompson v. People*, 4 Neb. 524; *Baldwin v. State*, 12 Neb. 61, 10 N. W. 463. This is true, even though another instruction may include the element omitted in the one by which the court

attempts to state to the jury the essential ingredients of the crime. *Richardson v. Halstead*, 44 Neb. 606, 62 N. W. 1077; *Carson v. Stevens*, 40 Neb. 112, 58 N. W. 845; *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290, 54 N. W. 568; *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *Metz v. State*, 46 Neb. 547, 65 N. W. 190. By this instruction the jury were told that it was their duty to find the defendant guilty if the facts therein set forth were proved. The instruction omits one essential element of the crime of larceny, a felonious intent. It is true that it is not necessary that the words "felonious" or "feloniously" be used by the court, provided words of like import or meaning are employed. *Philamalee v. State*, 58 Neb. 320, 78 N. W. 625. In the instruction complained of not even the words "wrongful" or "unlawful" appear. The jury were instructed merely that if he took the calf and delivered it to Kelley with the intention to convert it to his own use, and permanently deprive its owner of his property, the crime had been proven. This would have been his intent had he purchased the calf of its owner, or had the latter given it to him. Hence, there were no words in the instruction which imported that a felonious intent in the taking was necessary. It was therefore erroneous, and for that reason defendant is entitled to a new trial.

Numerous other errors are alleged in the petition in error and urged in the brief of defendant. We do not deem it necessary to discuss them. Many are trivial; others not likely to appear on another trial.

The judgment of the lower court is reversed.

STEIL V. TERRITORY OF OKLAHOMA.

12 Okla. 377—71 Pac. Rep. 653.

Decided January 8, 1903.

LARCENY—INDICTMENT: *Insufficiency—Demurrer—Arrest of judgment—Defects in substance.*

1. An indictment for larceny, which charges that the property described in the indictment was taken with the intent then and there, willfully, maliciously, and feloniously, to deprive the owner of the possession thereof, and which does not charge that the property was taken with

intent to deprive another thereof, is not sufficient to charge the crime of larceny under the statutes of this Territory.

Burford, C. J., dissenting.
(Syllabus by the Court.)

That which may be taken advantage of by demurrer, is not cured by a verdict; but is ground for motion in arrest of judgment.
(Additional syllabus by J. F. G.)

Error to District Court, Blaine County; Hon. John L. McAttee, Justice.

John Steil, convicted of larceny, brings error. Reversed.

At the October term of the District Court of Blaine County, Okl. T., John Steil, the plaintiff in error, was tried by a jury upon an indictment found by the grand jury of that county, the charging part of which indictment was substantially in the following language: "John Steil and Joe Steil, late of the county aforesaid, on June 24th, 1899, in the county of Blaine and territory of Oklahoma, aforesaid, did, unlawfully, willfully, stealthily, and feloniously, take, steal, and carry away, from the possession of one Ed Darrough, one set of leather harness, the property of Ed Darrough, of the value of twenty-five dollars, and one set of leather fly nets, the property of Seth Darrough, and in the possession of Ed Darrough, of the value of two dollars, with the intent then and there, willfully, maliciously, and feloniously, to deprive the owner of the possession thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of Oklahoma." To which indictment the defendant, John Steil, was arraigned, and entered a plea of not guilty, and at the same time demanded a separate trial, which was granted. Afterwards, at the October term, 1900, to wit, on the 9th day of October in said year, said cause came on for trial before a jury, and the following verdict was returned by the jury: "We, the jury impaneled and sworn in this case, find the defendant guilty of the crime charged in the indictment. John Hill, Foreman." The plaintiff in error filed a motion for a new trial, which was by the court overruled on October 13, 1900, to which ruling the plaintiff in error excepted. Then plaintiff in error moved an arrest of judgment, and the District Court overruled that motion, and plaintiff in

error took exceptions to such ruling. The court below, on the 13th day of October, 1900, rendered judgment against John Steil on that verdict, and sentenced him to nine months' imprisonment in the territorial prison, commencing on the date of the rendition of judgment, to which the plaintiff in error excepted, and brings the case here for review.

C. A. McBrian, Ernest M. Bradley, and John T. Bradley, for plaintiff in error.

J. C. Strang, Attorney General, for the Territory.

IRWIN, J. (after stating the facts). There are numerous assignments of error in this case, but we think it is only necessary to consider one, to wit, the error assigned that the court overruled the motion in arrest of judgment. We take it that this indictment is drawn under the statute of the Territory of Oklahoma defining "larceny," as it concludes with the language "contrary to the form of the statute," which language clearly indicates that the prosecution is under a statute, and not the common law. Hughes, Criminal Law & Procedure, sec. 2755.

"An indictment concluding, 'Contrary to the form of the statute,' clearly indicates a prosecution under a statute, and not the common law, and if there be no statute to cover the facts in the indictment, it will on motion be quashed." *Town of Paris v. People*, 27 Ill. 75.

The language of our statute defining "larceny," as contained in section 2371 (section 1, art. 4, c. 25, Laws 1893), reads as follows:

"Larceny is the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof."

Now, it seems to us that the reading of this statute clearly indicates that the gist of the crime is the intent to deprive another of the property described in the indictment, and that this portion of the definition is material, and a necessary part of the definition of larceny. Our statute does not make it larceny to deprive another of the mere possession of personal property, but it must be the intent to deprive the person of the property itself. There is a clear, well-defined distinction in the law between the right of possession of personal property, and the absolute right to the property itself. The one may exist entirely distinct and independent of the other.

One person may temporarily have the right of possession of personal property, and another person have the right of property or of title. It is not always, in the business affairs of life, that the owner of property at all times has the right of possession. The right of possession may be temporarily disposed of without disposing of or parting with the right of property. Now, the wrongful or even felonious depriving of an owner of the temporary right of possession may not be larceny, within the meaning of our law. It seems to us that, in order to make the mere charge of depriving the owner of possession of the property larceny, it would be necessary to go further, and charge that the person was depriving the owner of possession, which was with the intent to convert the property so taken to the use or benefit of the person taking it. This might bring it nearer within the definition of the term "steal," as known in common law.

This court, in the case of *Jewell v. Territory*, 4 Okl. 53, 43 Pac. 1075, lays down the rule that an indictment must fully charge the crime, and set out all that the law requires to be proved, and that the want of averment cannot be supplied by an independent finding of fact not alleged in the indictment.

Following the language of Chief Justice Dillon in the case of *State v. McCormick*, 27 Iowa, 402, where he says:

"There is no principle in the law of criminal pleading more reasonable in itself, and none better understood, than the one that the indictment must fully charge the crime; that it must set out all that the law requires to be proved before the penalty of the law can be inflicted."

And in the case of *Parker v. Territory*, 9 Okl. 109, 59 Pac. 9, this court says:

"An indictment charging felony must aver all the essential elements constituting the particular felony charged."

According to these decisions, it seems to us, the indictment is lacking in one very material allegation, to wit, the allegation that the property was taken with intent to deprive another thereof, which is material and necessary under the definition of larceny contained in our statute.

While the record does not disclose that this defect in the indictment was raised by a motion to set aside or by a demurrer,

we think it was sufficiently raised by a motion in arrest of judgment.

"The objects of the motion in arrest of judgment are to direct the attention of the trial court to substantial defects in the indictment, or to errors appearing on the face of the record proper." Hughes, Criminal Law & Procedure, sec. 3309; *State v. Koerner*, 51 Mo. 174; *State v. Miller*, 36 La. Ann. 158; *McClerkin v. State*, 20 Fla. 879.

In Bishop on Criminal Procedure (2d Ed.) vol. 1, page 697, sec. 1108, we find the following language:

"In the King's Bench, at any time between the conviction and the sentence, or immediately at the assizes, the defendant may move the court in arrest of judgment. The causes on which this motion may be grounded, although numerous, are confined to objections which arise upon the face of the record itself."

And in the same section we find this language:

"But any want of sufficient certainty in the indictment respecting the time, place, or offense, which is material to support the charge, as well as the circumstances of no offense being charged, will cause the judgment to be arrested."

And in support of this is cited 4 Blackstone's Com. 375.

And in the following section of the same work (1109) it is stated:

"It seems, however, to be a general rule that, as criminal proceedings are not aided after a verdict by any of the statutes of jeofailes or amendments, any objection which would have been fatal on demurrer will be equally so on arrest of judgment; and it is therefore usually reserved till this time, in order to obtain the chance of an acquittal."

And in the case of *State v. Barrett*, 42 N. H. 466, Justice Woodward, delivering the opinion of the court, says:

"A fault which would have been fatal on demurrer cannot be cured by the verdict, and may be taken advantage of by a motion in arrest of judgment. * * * The verdict in criminal cases does not cure substantial defects in the indictment."

This defect in the indictment being an omission of a material and necessary part of the definition of larceny as defined in our statute, we think it was clearly error for the court to overrule this motion in arrest of judgment. This being true, we do not

deem it necessary to consider or discuss the other assignments of error.

For this reason, the judgment of the District Court is reversed, with orders that the case be remanded, and that the District Court of Blaine County be instructed to grant the motion in arrest of judgment and quash the indictment.

BURFORD, C. J., dissenting; all the other Justices concurring.

STATE V. FOY.

131 N. C. 804—42 S. E. Rep. 934.

Decided December 16, 1902.

LARCENY: Insufficiency of evidence as to felonious intent at time of taking—Demurrer to the evidence.

1. To constitute the crime of larceny, there must be a felonious intent at the time the property is taken.
2. A box of candy being seen under a table in a back room of a confectionery, the defendant who was an employe, was watched for several days and finally as a method of detection, was sent to the room after sugar; he returned with the sugar and also the candy, and being asked regarding it, remained silent, and was arrested. Held, on demurrer to the evidence, that a felonious taking was not proved.

Appeal from Superior Court of Forsyth County; Hon. Thos. J. Shaw, Judge.

Will Foy, convicted of larceny, appeals. Reversed.

J. S. Lanier, for the appellant.

Robert D. Gilmer, Attorney General, for the State.

COOK, J. Whether there was any evidence tending to show that defendant was guilty of the larceny of the box of candy is the question raised by defendant's demurrer to the evidence. The only evidence introduced was that testified to by the witness Barbee, as follows: "I am employed as clerk by Mrs. W. J. and Clarence Cromer, candy makers and confectioners in the city of Winston. Defendant, Will Foy, had been working there for some time. On Monday, about the 16th of June, 1902, I saw a box of candy in the back room, under a table. I could not tell who put it there. I watched it every day to see if I could catch

the defendant, Will Foy, taking it away. On Friday of the same week I sent Will Foy in the room where the box of candy was, to get some sugar, and thought that was a good way to catch him, if he put it there. Will Foy, the defendant, went after the sugar; and while he was gone I waited and watched for him, to see if he got the candy. He came back with the sugar, and also the box of candy. I said, 'Will, what have you got there?' He did not say anything. I phoned for a policeman, and Policeman Miller came and sought the defendant, and took the box of candy away from him." Cross-examined: "I waited from Monday until Friday, trying to catch the defendant. During the whole time the box of candy remained in the other room, under the table. I could have prevented it from being stolen, but wanted to catch the one who put it under the table, so I could have him punished. I sent defendant in the room where the candy was, for some sugar, for the purpose of catching him if he should take it. I had been missing some candy, and I wanted to catch the thief, whoever he was."

To constitute the crime of larceny, there must be evidence of a felonious intent in the taking. Something more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the intent. There must be evidence to show that the taking was done under circumstances inconsistent with an honest purpose, such as when done clandestinely, or, when charged with, denies, the fact (4 Bl. Comm. 232); or secretly (*State v. Sows*, 61 N. C. 152; *State v. Ledford*, 67 N. C. 61; 2 Archb. Cr. Prac. & Pl. [6th Ed.] p. 366, note 4), or forcibly (*State v. Powell*, 103 N. C. 424, 9 S. E. 627, 4 L. R. A. 291, 14 Am. St. Rep. 821; *State v. Grigg*, 104 N. C. 882, 10 S. E. 684; *State v. Coy*, 119 N. C. 901, 26 S. E. 120); or by artifice (*State v. Deal*, 64 N. C. 270); and that there was an original felonious intent, general or special, at the time of the taking (*State v. Arkle*, 116 N. C., at page 1031, 21 S. E., at page 408). The evidence of the State's witness fails to show any act done by defendant inconsistent with an honest purpose, or inconsistent with the duties of his employment. The box of candy was lying under the table, where by inference it appears it did not belong, and there is no evidence to show that defendant had put it there or that he knew it was there. He was working for the firm, and was sent by the witness in the room after some

sugar, and returned with the sugar, and also the box of candy; bringing them both to the witness, clerk of the firm, who had sent him. Being asked (having the sugar and the box of candy), "What have you got there?" did not say anything, and was forthwith arrested. There is no more evidence to show that he took the candy feloniously than the sugar. He was ordered to bring the sugar, and also brought the candy, which was out of its usual place, but the taking of both was under the same conditions and circumstances. There was no artifice, trick, secrecy, concealment, force, or appropriation of either. The fact of his bringing the candy together with the sugar was no evidence that he had placed the candy where it was found. The evidence was insufficient, and his honor erred in not sustaining defendant's demurrer.

Error.

NOTE. An Arkansas case—Openly killing hogs—Claim of ownership—Insufficiency of evidence. In *Blair v. State*, 71 S. W. Rep. 582, decided January 3, 1903, the court rendered the following opinion:—

HUGHES, J. The appellant, Will Blair, was indicted for grand larceny, pleaded not guilty, was tried and convicted, made a motion for new trial, which was overruled, and he appealed to this court.

The testimony in the case tends to show that the appellant had a lot of hogs on the range, some several miles from his residence, at the time of the alleged offense; that he went to the range where the hogs were, and killed eight head of hogs openly and in the presence of one Edmons and another; that he claimed the hogs that he killed were his own; that among his hogs were two different marks,—one his own, and one the mark of one Thornton, from whom he had bought some hogs. The indictment charges the appellant with stealing one hog, the property of F. S. Vick. The proof tends to show that one of the hogs killed by the appellant was in the same mark of some of Vick's hogs that were in the same range; that some of appellant's hogs in that range were in the same mark as Vick's hogs; that appellant made no concealment that he had killed the hogs, but claimed that they were his, and killed them in the presence of Edmons, Edmons' two boys, and one Mose Powell. Edmons was a brother-in-law of Vick. There is no positive evidence that the appellant stole the hogs he killed, or any of them, and we think that the proof fails to show that there was any felonious intent on the part of the appellant in killing the hogs, if it is sufficient to show that the hogs he killed were not his own.

For the lack of evidence to sustain the verdict, the judgment is reversed, and the case is remanded for a new trial.

STATE V. LITTRELL.

170 Mo. 13—70 S. W. Rep. 143.

Decided October 27, 1902.

LARCENY: Instruction insufficient—Felonious intent.

It was not sufficient that the court instructed the jury to find the defendants guilty if the jury was satisfied from the evidence that the defendants, "did then and there willfully and feloniously steal, take, and carry away * * * the personal property of John Adams," but the court should have first required the jury to find that, the money was wrongfully and fraudulently taken and carried away by the defendants, with felonious intent to convert it to their own use, and to make it their own property, without the consent of the owner.

Appeal from Circuit Court, Chariton County; Hon. J. P. Butler, Judge.

Charles Littrell and George Proffitt, convicted of grand larceny, appeal. Reversed.

Wallace & Miller, for the appellants.

Edward C. Crow, Attorney General, and *Sam B. Jeffries*, Assistant Attorney General, for the State.

BURGESS, J. At the February term, 1902, of the Circuit Court of Chariton County, defendants were convicted of grand larceny, and their punishment fixed at two years' imprisonment, respectively, in the penitentiary, under an information theretofore filed by the prosecuting attorney of said county in the office of the clerk of the Circuit Court charging them with having, on the 10th day of December, 1901, at said county, unlawfully and feloniously stolen \$35 of lawful money, of the value of \$35, and two pair of spectacles, of the value of \$1 per pair, and one pocketknife, of the value of \$1, all of the aggregate value of \$35, all of the money being the personal property of one John Adams. The conviction was for stealing the money alleged to have been stolen. They appeal.

It is only necessary to a disposal of the case by this court to pass upon one question, and that is with respect to instruction No. 1 given by the court on behalf of the State, which defendants insist is erroneous in that it did not require the jury to find that the money was wrongfully and fraudulently taken and carried away by the defendants, with the felonious intent to con-

vert the same to their own use, and to make it their own property, without the consent of its owner. The instruction reads as follows:

"(1) The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendants, Charles Littrell and George Proffitt, at the county of Chariton, in the State of Missouri, on or about the 10th day of December, A. D. 1901, and within three years next before the filing of the information in this case, to wit, the — day of December, A. D. 1901, did then and there willfully and feloniously steal, take, and carry away thirty-five dollars, lawful money of the United States, of the value of thirty-five dollars, or any other amount of money of the value of thirty dollars or more, the personal property of John Adams, then you will find the defendants guilty of grand larceny, and assess the punishment of each defendant separately at imprisonment in the penitentiary for a term not less than two years nor more than five years."

Defendants' contention is conceded by the State to be settled by a uniform decision of this court (*State v. Gray*, 37 Mo. 463; *State v. Shermer*, 55 Mo. 83; *State v. Ware*, 62 Mo. 602; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *State v. Lackland*, 136 Mo. 26, 37 S. W. 812; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417), and that the judgment must, of necessity, be reversed.

It is so ordered, and the cause remanded. All concur.

STATE V. SALLY.

41 Ore. 366—70 Pac. Rep. 396.

Decided October 27, 1902.

LARCENY—POSSESSION OF STOLEN PROPERTY—PRACTICE: *Question first raised on appeal, ignored—Instructions taken together—Error rendered harmless—Instruction as to possession of stolen property—Common law rule as to asking the accused if he has anything to say the sentence should not be pronounced.*

1. Unless there is a total failure of evidence, a motion to direct a verdict of not guilty, should specify the particular grounds of the motion; hence,—on a general motion, the failure to prove non-consent, cannot be raised for the first time on appeal.
2. Under testimony of the defendant, that he converted the alleged stolen steer to his own use, knowing that it was not his but believing that it

was his father's and that he had a right to do so, an instruction, that "the intent to convert the animal to his own use, knowing that it was not his, is the gist of this offense," standing alone would have been error, had it not been cured by other instructions.

3. Error if any, in admitting testimony as to marks on the alleged stolen article, is harmless, where the thing itself is introduced in evidence, and its identity admitted.
4. It is not error to refuse an instruction, the substance of which is covered by other instructions.
5. It was not error to refuse an instruction, to the effect, that while possession of recently stolen property is a circumstance tending to show guilt, that if reasonably and credibly explained, the presumption of guilt arising therefrom is overcome,—the court instructing that while such possession unexplained is a circumstance tending to show guilt, that if the jury believe that the defendant came by the property honestly, or that the possession was not accompanied by circumstances indicating guilt, every such presumption of guilt is removed.
6. The presumption arising from the possession of recently stolen property is one of fact and not one of law, and it may be questioned whether it is not invading the province of the jury to instruct the jury as to what would overcome such presumption; but in the present instance, the instruction was favorable to the defendant, and hence not prejudicial.
7. It is doubtful whether in minor felonies, the court need ask the defendant, before passing sentence, if he has anything to say why the sentence should not be passed upon him; but if so, the right was substantially recognized, through the motions for new trial and in arrest of judgment.

Appeal from Circuit Court, Baker County; Hon. Robert Eakin, Judge.

William Sally, convicted of larceny, appeals. Affirmed.

George J. Bentley and *George A. Smith*, for the appellant.

D. R. N. Blackburn, Attorney General, and *Samuel White*, District Attorney, for the State.

BEAN, J. The defendant was tried for and convicted of the crime of larceny by stealing a steer, the property of one E. H. Powers. From the judgment which followed he appeals on the ground that the court erred in overruling his motion to direct a verdict of acquittal, in the admission of testimony, and the giving and refusing of certain instructions to the jury. From the evidence it appears that on the afternoon of October 26, 1901, the defendant butchered an animal alleged by the prosecution to have been a steer belonging to Mr. Powers; that he cut the

hide into four or five pieces, and on the following morning put it in a water hole some 50 or 60 feet distant from his residence, where it was subsequently found by an officer of the law. The defendant admitted the killing of the animal and putting its hide in the water hole as charged, but insisted that it was a heifer, and belonged to his father, who had given him permission to kill it, and that the hide was placed in the water hole for the purpose of keeping it soft and green. Powers was called as a witness for the State, and testified, among other things, that the hide in question had his brand thereon; that he had not sold or disposed of the animal to any one, nor had he authorized the defendant or any one else to butcher it. But he did not testify directly, nor was he asked, whether he had consented to the taking of it by the defendant.

1. At the close of the testimony for the prosecution, the defendant moved the court to direct a verdict of not guilty, for the reason that the evidence was not sufficient to justify a conviction; and it is now insisted that this motion should have been sustained, because Powers did not testify directly that the animal was taken by the defendant without his consent. The evidence on this point is perhaps sufficient, but, whether it is or not, the objection made cannot be urged for the first time on appeal. Under the practice long established, if there was a failure or proof in this particular, it should have been specified in the motion for an order to acquit. Such is the rule laid down in *State v. Tamler*, 19 Or. 528, 25 Pac. 71, 9 L. R. A. 853, where it is said: "In a motion asking the court to direct an acquittal, where it is claimed that the evidence is insufficient to prove the crime charged, it ought to specify the particulars in which it is claimed the evidence is insufficient, unless there is a total failure of proof; otherwise the attention of the trial court will be directed to the evidence as a whole,—that is, whether there is any evidence upon which a verdict may be founded,—and wholly omit to consider the particular matter in which the alleged insufficiency consists, and which is relied upon in this court, and perhaps subsequent research may have suggested." This same doctrine has been reaffirmed in *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797; *State v. Robinson*, 32 Or. 43, 48 Pac. 357; *State v. Fiester*, 32 Or. 254, 50 Pac. 561; *State v. Schuman*, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754.

2. It is next insisted that the court erred in instructing the jury that "the intent to convert the animal to his own use, knowing that it was not his, is the gist of this offense." It is argued that this instruction is erroneous, because the defendant admitted the taking of the animal with the intent to convert it to his own use, knowing that it did not belong to him, but believing that it belonged to his father, and that he had authority and permission to take it. The instruction complained of, standing alone, might be open to some criticism; but it is a part of the general charge, and must be construed in connection with other portions thereof. Immediately before giving this instruction, and in the same connection, the court charged the jury that larceny consists in the felonious taking, stealing, and carrying away of the property of another, and, immediately thereafter, that if they believed from the evidence that defendant killed the animal which he is charged with stealing, "honestly believing, had reason to believe, and did believe it to be the property of William A. Sally, Senior, then the defendant would not be guilty as charged, and should be acquitted," and that it was incumbent upon the State to establish to the satisfaction of the jury, beyond a reasonable doubt, "that the defendant took the same with felonious intent, and unless such facts are established to your satisfaction, beyond a reasonable doubt, you will find the defendant not guilty." Taking the particular part of the instruction complained of in connection with the other portions referred to, it is perfectly apparent what the court intended, and what the jury must have understood, and that no injury could have resulted to the defendant therefrom.

3. The hide which it is admitted was taken from the animal killed by the defendant was produced and offered in evidence. During the trial the court permitted witnesses, over the defendant's objection, to testify as to the brand thereon, and error is based upon this ruling. If the admission of this testimony was error at all, it was harmless, because the hide was in evidence, and the jury could and did inspect it.

4. The defendant requested the court to charge the jury, among other things, that if he took the animal, honestly believing that he had a right to take it, and acted wholly upon that belief, he should be acquitted, and that if he took it under a claim of right, honestly entertained, and afterward discovered his

mistake, a subsequently formed intent to appropriate it to his own use would not constitute the crime charged. These instructions were substantially covered by the general charge already alluded to, and there was no error in refusing to give them.

5. The defendant also requested the court to charge the jury that while the possession of property recently stolen is a circumstance which they might take into consideration as tending to show guilt, yet, if that possession is reasonably and credibly explained, the presumption of guilt arising therefrom is overcome. This was refused, but the court charged that, while the recent possession of stolen property, if unexplained, is a circumstance tending to show the guilt of the prisoner, yet, if the jury believe from the evidence that the defendant came honestly into the possession of the property, or that it is unconnected with any suspicious circumstance of guilt, this would be a satisfactory account of his possession, and would remove every presumption of guilt growing out of the same. This instruction seems, in substance, the same as that requested, and is certainly as favorable to the defendant as he could reasonably expect.

6. The presumption arising from the possession of stolen property is one of fact, and not of law. It is a circumstance in the case from which the jury may infer guilt, but no legal presumption of guilt arises therefrom. *State v. Hale*, 12 Or. 352, 7 Pac. 523.

7. The weight and value of such testimony are exclusively for the jury, and it may well be questioned whether the court, in instructing them as to what would overcome the presumption, did not invade their province. *State v. Maloney*, 27 Or. 53, 39 Pac. 398. But if so, it was an error favorable to the defendant, of which he cannot complain.

8. And finally it is asserted that the court erred in sentencing the defendant without asking him at the time whether he had anything to say why sentence should not be pronounced. At common law, it was essential in all capital offenses that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced. Whart. Cr. Pl. (8th Ed.) § 906; *Ball v. U. S.*, 140 U. S. 118, 129, 11 Sup. Ct. 761, 35 L. Ed. 377. But it is not believed that this rule applies to minor felonies. *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; 19 Enc. Pl. & Prac. 457. But if it does, it was

substantially complied with in this case. The defendant moved for a new trial and in arrest of judgment, both of which motions were overruled at the time, or immediately prior to the sentence. This shows that he was accorded practically all that the common-law rule was intended to secure. *State v. Johnson*, 67 N. C. 55. And in the words of Mr. Justice Stone in *Spigner v. State*, 58 Ala. 421, 424: "It would look like child's play to remand this cause, when the only effect could be to propound the question to the prisoner, receive his answer that he had nothing further to offer, and then pronounce the sentence of the law on the verdict of guilty heretofore rendered by the jury, and which is free from error."

The judgment will be affirmed.

STATE V. MARQUARDSEN.

7 Idaho 352—62 Pac. Rep. 1034.

Decided December 3, 1900.

LARCENY—POSSESSION OF STOLEN PROPERTY EXPLAINED—PRACTICE: *Affidavit of jurors not admissible to impeach verdict.*

1. Evidence in this case considered, and found insufficient to warrant conviction.
2. A motion for a new trial, based upon affidavits of individual jurors impeaching the verdict of a jury of which said affiants were members, cannot be sustained.

(Syllabus by the court.)

Proof of possession of stolen property will not sustain a verdict, where such possession is explained by witnesses whose testimony bear strong indications of truth.

(Additional syllabus by J. F. G.)

Appeal from District Court, Canyon County; Hon. George H. Stewart, Judge.

Emil Marquardsen, convicted of larceny, appeals. Reversed.

Hawley & Puckett, for the appellant.

Samuel H. Hays, Attorney General (*Frank J. Smith* and *E. J. Frawley*, of counsel), for the State.

HUSTON, C. J. The defendant was convicted of the crime of grand larceny, in the alleged stealing of five head of cattle. The only evidence against the defendant is the finding in his

possession of the hides of some of the alleged stolen cattle. Against this evidence, defendant alleges that he bought said cattle, giving the time and circumstances under which the purchase was made. Earl McCullough, a witness for the defense, testified, as follows: "My name is Earl McCullough, and I live at Falk's Store. I am a fruit and stock raiser. My age is twenty years. I am acquainted with defendant, and know where his slaughter house is in Payette, and was there about the twenty-fourth of October last, about noon. At that time I saw a slim light-complected man, of middle age, who was a stranger to me. He was not on his horse at the time, but I suppose he was on horseback as there were two horses there. I saw five head of cattle there, but I can't describe them. I noticed one bald-faced cow among them. They was mostly all dark-colored cattle. I heard some conversation between this man and the defendant at that time in regard to the selling of the cattle and about the price. Twenty-six dollars a head was agreed on, I believe. I saw the defendant pay this man some money,—paper money, currency. I was there probably five minutes. After the defendant had his preliminary examination, he employed me to go out and see if I could see anything of this man; and I went over to Ontario, Nyssa, and up the river around Emmett, and around there. I guess I was around for nearly two weeks." Other witnesses corroborate the testimony of McCullough. We think the presumption arising from the possession of the hides of the alleged stolen animals by the defendant is fully overcome by the testimony of the defense. The testimony of McCullough bears the impress of truth. There is nothing in his statements that would lead an unprejudiced mind to believe that he was stating anything but the facts as he witnessed them. He does not, as a suborned or tutored witness would do, try to make his testimony strong by going into details. He simply states the facts as he saw them, and the cross-examination failed to shake or discredit him, and no effort was made to impeach him. The testimony of McCullough was corroborated by that of R. W. Jacobsen, which is as follows: "I reside on the Payette river, about two miles and a half above Payette town, and was living in that vicinity in October last. The defendant's slaughter house adjoins my father's land, with the exception of a lane between it on the north. On the 24th of last October I saw be-

tween three and six head of cattle being driven to the slaughter house, but I did not pay any particular attention to them. They were being driven by somebody,—one man,—but I did not see his face, to recognize him. It was not the defendant. I fix the date, because I was scattering hay to dry, and finished up about 2 o'clock. The man was driving down the river, on the main-traveled road, next the foothills. I should judge he was a quarter of a mile—maybe less—from the slaughter house when I saw him. He drove directly to the slaughter house. I did not notice where this man went to when he left the slaughter house." Other testimony was offered in corroboration of the defense.

One of the grounds upon which the defendant based his motion for a new trial is an attempt to impeach the verdict of the jury by the affidavits of certain members of the jury. We wish to say, once for all, that we entirely disapprove of this practice. A man who will render a verdict involving the life or liberty of a fellow citizen, and then make an affidavit in which he admits his own perjury, is as unfit for a juror as he is for any other position in which the rights of a citizen are involved. It is surprising that counsel will persist in loading the record with this kind of trash, when the recognition thereof has been so uniformly repudiated by all courts. The overwhelming weight of authority is that the verdict of a jury cannot be impeached by the affidavits of individual jurors.

Objections are raised to certain instructions given and refused by the court, but we find no error in the instructions. The conclusion of the court is that the evidence, as the same appears in the record, is insufficient to support the verdict. The judgment of the District Court is reversed.

QUARLES and SULLIVAN, JJ., concur.

NOTE (By J. F. G.).—Had not the evidence been such as justified a reversal, and had each of the twelve jurors made an affidavit showing that he was guilty of perjury and unfit to sit as a juror on a case "involving the life or liberty of a fellow citizen"; would the court have sustained the verdict found by twelve self-confessed perjurers? In Texas at least, affidavits of jurors are received to impeach verdicts, as appears by cases in this volume.

Possession not exclusive—Identity of the accused—Only exclusive possession of stolen property can be shown in evidence—Not proper to show that other property stolen at the same time was found in a barn

owned and controlled by defendant's father, to which the defendant and his brother had access—Testimony that a person seen in a wagon with the stolen property, favored the defendant, is not sufficient proof of identity.—In State v. Wackernagel.—118 Iowa 12, 91 N. W. Rep. 761,—the court said:—

"On the evening of March 2, 1901, five hogs belonging to one R. C. Beamer were taken from the stock yards at the town of Clearfield, and placed in the stock yards at the town of Lennox, some 10 miles distant. Defendant and his brother Frank were jointly indicted for the larceny of these animals, and at defendant's request he was given a separate trial, resulting in a verdict and judgment of guilty.

"That the hogs were conveyed from one place to the other by a team and wagon belonging to the father of the defendant, and that whoever drove it was also guilty of the larceny of some harness on the same evening, is so well settled as to be beyond the pale of reasonable discussion. The only difficulty in the case lies in the lack of evidence tending to connect defendant with either larceny. The harness which was stolen was found in a barn owned and controlled by defendant's father, and to which either the father or the brother had as ready access as the defendant. The only evidence, then, which tends to connect defendant with the larceny, is that of several witnesses, who said they saw two men in the wagon on its way from Clearfield to Lennox and at Lennox; and of one who said that one of the men he saw would compare favorably with the defendant. No one pretends to identify defendant as being one of the men who was in the wagon or at Lennox, where the hogs were left. Evidence of similar crimes committed at the same time, and by the same person, is sometimes admissible, but where offered, as in this case, to show defendant's connection with the main offense, it should sufficiently appear that defendant was connected with the subject of the larceny. In the instant case there is no evidence, other than the finding of the stolen property, tending to connect defendant with the crime. It was not found in defendant's possession, and had no more of a tendency to connect defendant with the larceny than his brother or his father. Indeed, the presumption is that the father was in control of the premises where the harness was found and there is nothing to rebut this presumption. Because the stolen harness was found in a barn owned and controlled by the father of the defendant, there being no evidence that defendant himself was ever in the possession thereof, testimony as to the stealing of the harness should not have been admitted against the defendant, or if admitted, should not be considered in determining his guilt or innocence. Had there been any connection between the two offenses, and evidence to show that defendant stole the harness, doubtless such evidence would not only be competent, but controlling. But, in the absence of a showing that defendant was guilty of stealing the harness, the evidence should not have been received, nor should it be considered against him. Evidence as to the possession of stolen property should be such as to indicate that the defendant and not some one else, took the same, *State v. Griffin*, 71 Iowa, 372, 32 N. W. 447."

STATE v. BELLAMY.

63 Kan. 144—65 Pac. Rep. 374.

Decided June 8, 1901.

LARCENY—SPECIAL STATUTE—CRIMINAL COMPLAINT: *A complaint under general act, not sustained by proof of stealing wire from a fence—Necessity to set out the elements of a statutory offense—Presumption of innocence.*

Where the statute specifically describes an offense, or uses language descriptive of it, a complaint drawn thereunder should substantially follow the descriptive language. A complaint which charges "that the defendant did steal, take, and carry away certain personal property, to wit, forty pounds of barb wire, of the value of \$2.00," etc., is not sufficient to admit evidence or support a conviction of severing from a fence certain portions thereof, and converting it with intent to steal.

(Syllabus by the court.)

Appeal from District Court, Harper County; Hon. P. B. Gillett, Judge.

Edward Bellamy, convicted of larceny, appeals. **Reversed.**

Geo. E. McMahon and *E. C. Wilcox*, for the appellant.

A. A. Godard, Attorney General, and *R. P. McColloch*, County Attorney, for the State.

GREENE, J. The appellant was complained of under section 80 of the crimes and punishment act (Gen. Stat. 1901, § 2071): "Every person who shall steal, take, and carry away any money or personal property or effects of another, under the value of twenty dollars, (not being the subject of grand larceny, without regard to value) shall be deemed guilty of petty larceny, and, on conviction, shall be punished by imprisonment in the county jail, not exceeding one year, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment." The complaint charged "that on or about the 21st day of March, 1900, in the county of Harper, in the State of Kansas, Edward Bellamy did then and there unlawfully take, steal, and carry away certain personal property and effects of the affiant, to wit, about forty pounds of barb wire, of the value of \$2.00, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Kansas." On the trial the proof was that the property so taken and carried away was a strand

of barb wire, and, at the time it was so taken was securely fastened to posts that were firmly set in the ground, and was one of several strands, which, before being so detached, was a part of a barb-wire fence that had been standing as a fence for several years. The evidence also proved that the detaching of the wire and the asportation was one continuous act. When the State had concluded, appellant demurred to the evidence, and also filed a motion to discharge and a motion for a verdict on the evidence, each of which was separately overruled, and to which appellant excepted. He then introduced evidence, but did not disprove the offense established by the appellee. The jury returned a verdict of guilty, "We, the jury, find the defendant guilty as charged in the complaint." The appellant then filed his motion for a new trial, which was overruled, and he appeals.

This conviction was under section 87 of the crimes and punishment act: "If any person shall sever from the soil of another any produce growing thereon, or shall sever from any building, or from any gate, fence or other railing or inclosure, or any part thereof, or any material of which it is composed, and shall take and convert the same to his own use, with the intent to steal the same, he shall be deemed guilty of larceny in the same manner and of the same degree, as if the articles so taken had been severed at some different and previous time." Is this information sufficient to admit the evidence offered, and to sustain the conviction? Counsel for appellant have ably argued that it is not. The contention of appellee is that section 87 only prescribed a rule of evidence by which simple larceny may be proved. With this contention we do not agree. The offense established by the evidence, under section 87, is not included in the general charge of petty larceny. It is not one of the grades of that offense. This section creates a different and distinct offense, although called larceny and differs materially from simple larceny in one very essential particular: It is not necessary, in the prosecution for a simple larceny, to prove that the defendant converted the property stolen to his own use. If he stole and carried it away with the intent to deprive the owner of the use of his property, he is guilty. This is not sufficient to sustain a conviction under section 87. Under that section it must be shown that the appellant detached the property, and converted it to his own use, with the intent to steal it. The

law presumes every one innocent; therefore, one charged with a crime is presumed to know nothing concerning it except what is charged in the written complaint lodged against him, and he had a right to demand that the nature and cause of the accusation thus charged be clearly and specifically set out, that he may be fully informed thereof. *State v. Behee*, 17 Kan. 404; *State v. Banks*, 33 Kan. 714. Mr. Wharton, in his Criminal Law, says: "Where the words of the statute are descriptive of the offense, the indictment should follow the language, and expressly charge the described offense of the defendant, or it will be defective. In such case the defendant must be specially brought within all the material words of the statute, and nothing can be taken by intendment." Mr. Bishop, in his work on Statutory Crimes, in section 415, in speaking of larceny of things fixed to the realty, uses this language: "Still, in these cases the indictment must follow any descriptive words which the statute may contain. *Reg. v. Trevenner*, 2 Moody & R. 476. This was a prosecution under the statute that provided that, 'if any person shall take,' etc., 'any ore,' etc., 'being in such mine, shall be deemed guilty of felony, and upon conviction thereof shall be liable to be punished in the same manner as in the case of simple larceny;' and it was ruled that the words 'being in such mine' should in some way be covered by the allegation. To the same effect was the holding under the statute which made it punishable in any one "to steal, rip, cut, or break with intent to steal any lead being fixed to any dwelling house." The words 'being fixed to any dwelling house' were important, and it was necessary that they be covered by the indictment." When the statute specifies certain acts, which, if done in a particular way, will constitute a crime, the pleader must bring his indictment fairly within the statute. He must describe the offense either in the descriptive language of the statute, or in such language of his own as will, by a fair interpretation thereof, include the descriptive language employed in the statute. It is always safer to follow the statute. No attempt was made in this case to do either. The judgment of the court below will be reversed. All the justices concurring.

NOTE (By J. F. G.).—As to indictments for statutory offenses, see 11 Am. Cr. Rep. 513.

When a statute declares that to be larceny, which was not so at com-

mon law, the elements of the statutory offense must be set out in the

indictment, and proof of such statutory offense will not sustain an indictment simply charging common law larceny. (*Kibbs v. People*, 81 Ill. 599.)

WILBURN V. TERRITORY.

10 New Mex. 402.—62 Pac. Rep. 968.

Decided August 23, 1900.

LARCENY—INDICTMENT—ALIBI—STATUTE—PRACTICE: *Description of the stolen property—Asportation—Challenge of juror—Burden of proof as to an alibi—Special statutes not repealed by general statutes.*

1. An animal stolen being described in the indictment as a cow, such description is sufficient to support a conviction under section 79, Comp. Laws 1897, making it an offense to steal, etc., any neat cattle, etc.
2. Where a challenge for cause of a juror upon the ground of prejudice or bias against defendant is tried by the court, its decision rests upon a sound discretion, and, there being evidence to support the conclusion of law, the judgment of the court thereon will be sustained.
3. The element of asportation in the statutory crime of neat cattle is proven by evidence showing that defendant had driven the animal a distance of about 600 yards, then killed it, and removed and carried away the hide and other parts of the animal, thereby depriving the owner of the immediate possession of it.
4. The burden of proving an *alibi* is upon the defendant, after the Territory has made out a *prima facie* case, to the extent, at least, of raising a reasonable doubt of guilt.

Held, that sections 15, 16, c. 47, Laws 1884 (sections 79, 80, Comp. Laws 1897), are parts of a special act, enacted for the protection of live stock, and provide that a person convicted thereunder shall be deemed guilty of a felony and grand larceny, and be subject to punishment in the penitentiary and by fine, notwithstanding the value of the animal stolen is less than \$20; and are not repealed by section 8, c. 80 Laws 1891 (section 1187, Comp. Laws 1897), which is part of the general act defining the punishment of the crime of larceny, graded according to the value of the property stolen.

(Syllabus by the court.)

Appeal from District Court, Colfax County; before Justice William J. Mills.

John Wilburn, convicted of larceny, appeals. Affirmed.

E. V. Long and *L. C. Fort*, for the appellant.

Edward L. Bartlett, Solicitor General, for the Territory.

CRUMPACKER, J. At a special term of the District Court of the Fourth Judicial District of the Territory of New Mexico within and for the county of Union, the defendant, John Wilburn, on the 1st day of July, 1897, was indicted by the grand jury of said District Court, said indictment charging "that said John Wilburn, in the said County and Territory, one cow, of the value of twenty-five dollars, of the goods, property, and chattels of Candido Garcia, feloniously and unlawfully did steal, take, and drive away, contrary to the form of the statute in such cases made and provided." Upon arraignment the defendant pleaded not guilty, and, the case having been removed to Colfax County, the defendant was there placed upon his trial, and was found guilty as charged in the indictment, and sentenced by the court to five years' imprisonment in the Territorial penitentiary, and to pay a fine of \$1,000. From the judgment and decision of said court the defendant has appealed to this court, assigning 19 errors, which may all be disposed of in the consideration of the following points discussed in appellant's brief: (1) That the indictment was fatally defective in not charging any crime against the laws of the territory; (2) that the court erred in overruling appellant's challenge to juror J. H. Smith, and in allowing him to sit as a juror in the case; (3) that there was no evidence to sustain the verdict, and that improper evidence was admitted and proper evidence excluded on the trial; (4) that the court erred in its instructions in regard to larceny, and also in regard to the defense of an alibi; and (5) that the court erred in sentencing defendant, the law limiting the punishment in this case to imprisonment in the county jail. These will be considered here in the above order.

1. Passing over appellee's objections to our consideration of the question of the sufficiency of the indictment, we find the word "cow," as used in the indictment, to be used in its general and ordinary sense, meaning the mature female of bovine animals. Under section 67, Comp. Laws 1897, the description in an indictment laid under section 79, Id., of an animal of the bovine kind, is sufficient. Cow being of such kind, and a sufficient term, the objection to the indictment was properly overruled. *Territory v. Christman* (N. M.) 58 Pac. 343.

2. The grounds of objection to juror Smith were that he was a member of an association organized for the prosecution of

parties suspected of the larceny of cattle, and that he subscribed money for the purpose of prosecuting people charged with that crime, or suspected of the crime of larceny of animals. The challenge was tried by the court, and its decision rests upon a sound discretion; and, unless it appear from the evidence that the court abused its discretion, its action thereon must be sustained. The evidence appearing in this record upon the trial of the challenge clearly warrants the conclusion of law to support the judgment of the court thereon.

3. All the material questions raised under the fourth point are disposed of in considering appellant's contention of no asportation proven. The Territory proved that appellant was seen driving this cow; that he was seen to drive it a distance of about 600 yards; that a shot was then heard; and that in a very short space of time thereafter appellant was again seen in the act of skinning the cow, and that the carcass of the animal was afterwards discovered with the skin and other parts of the animal removed. Appellant's counsel argue that because this driving and skinning of the cow took place within the pasture of appellant's employer, where it is contended "the cow was by the consent of its owner," the Territory has not shown any taking in any legal sense, and his counsel ask, "Was not that cow lying there dead, at all times from the moment she fell to the time when this indictment was found, two years later, in the possession of the owner as much as while she was in his pasture alive?" While we do not find any evidence in the record that the cow was by its owner's consent in the pasture of appellant's employer, still, upon the statement of facts recited in appellant's brief, we must conclude that the driving of the animal and carrying away of parts of it, thereby depriving the owner of the immediate possession of it, was such a taking by appellant as, in view of the felonious intent shown by the evidence in this case, would constitute the element of asportation in the statutory crime of larceny of neat cattle. This is too plain to require citation of authorities.

4. On the trial the appellant introduced evidence tending to support an *alibi*, and the court, in the ninth instruction, instructed the jury as to the law thereon. The appellant objects to that part of the instruction whereby the jury were told that the burden of proof is upon the defendant to prove an *alibi*. By the

same instruction the court instructed the jury that: "When the proof is in, then the primary question is (the whole evidence being considered, both that given for the defendant and the Territory), is the defendant guilty beyond a reasonable doubt? The law being that, when the jury have considered all the evidence,—as well that touching the question of the *alibi* as the criminalizing evidence introduced by the prosecution,—then, if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, they shall acquit him; otherwise not." Similar instructions have been sustained in this court in the cases of *Trujillo v. Territory*, 7 N. M. 44, 32 Pac. 154, and *Borrego v. Territory*, 8 N. M. 477, 46 Pac. 349, and in many of the States. But, conceding the correctness of the rule as contended for by appellant's counsel, it is manifest that the term "burden of proof," as used in this instruction, and as it so frequently is used in many of the decisions and by some text writers, does not imply that the defendant must prove his defense by such evidence as will satisfy a jury that his defense is true, but only that, after the Territory has made out its case, it devolves upon the accused to introduce evidence, if he has any, to prove his *alibi*, if he relies upon such a defense. In that sense the burden is upon the accused, and, in order to maintain it, he is bound to establish in its support such facts and circumstances as are sufficient, when considered in connection with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of his guilt. *Carlton v. People*, 150 Ill. 181, 37 N. E. 244. Certainly, no fairly intelligent jury could have understood the charge of the court in any other sense when they were instructed by the court, in the same connection, "that, when the proof is all in, then the primary question is (the whole evidence being considered, both that given for the defendant and the Territory), is the defendant guilty beyond a reasonable doubt?" We are aware that the expression "the burden of proof is upon the defendant to make out his proof of an *alibi*," had been criticised by a few courts and text writers. Bish. Cr. Proc. § 1066. But, when these cases are carefully considered, it will be seen that the criticism has no application to the expression as used by the court in the case at bar. *State v. Thornton* (S. D.) 73 N. W. 196, 41 L. R. A. 530; *State v. Maher*, 74 Iowa, 77, 37 N. W. 2. Therefore, taking the ninth instruction given by the court as

a whole, it is correct, and covers the whole ground. It expressly leaves the question of reasonable doubt of defendant's guilt for the jury to determine upon all the evidence in the case.

5. The accused was indicted and convicted under section 15, c. 47, Laws 1884 (section 79, Comp. Laws 1897), the indictment alleging the value of the animal stolen at \$25. That section, so far as material here, is as follows: "Any person who shall steal, embezzle, or knowingly kill, sell, drive, lead, or ride away, or in any manner deprive the owner of the immediate possession of any neat cattle, horse, mule, sheep, goat, swine, or ass, * * * shall be deemed guilty of a felony and on conviction thereof in any court of competent jurisdiction shall be punished by imprisonment not less than one year nor more than five years, and by a fine not less than \$500 nor more than \$5,000, at the discretion of the court."

Section 15 of the said act (section 80, Comp. Laws 1897) provides further as follows: "* * * In all cases of felonious taking, stealing, riding, driving, leading and carrying away any animal or animals herein referred to, the same shall be deemed and taken to be and the courts of this Territory shall construe the same to be grand larceny, subjecting the offender to be committed to the penitentiary for a term of not less than one year nor more than ten years, except as otherwise provided in this act, notwithstanding the value of such animal or animals may be less than twenty dollars." Section 8, c. 80, Laws 1891 (section 1187, Comp. Laws 1897), is as follows: "Every person convicted of the crime of larceny or of the crime of embezzlement or of the crime of feloniously receiving stolen goods or property, shall be punished by imprisonment in the Territorial penitentiary not less than one year nor more than ten years, if the value of the property stolen, embezzled or feloniously received shall exceed twenty-five dollars; and by imprisonment in the county jail not more than six months or by fine not exceeding two hundred dollars or by both such fine and imprisonment, if the value of such property shall be twenty-five dollars or less." It is urged that the former provision was repealed by the latter, and that, the value of the property stolen being no greater than \$25, the maximum sentence that could legally have been imposed was six months' imprisonment in the county jail, and a fine of \$200. It is a well-established rule of statutory construction that, in the

absence of a repealing clause expressly designating the prior enactment intended to be abrogated, no new statute will be allowed to sweep away existing legislation, unless its terms are such that the new and the old cannot consistently stand together. Repeals by implication are not favored, and this is true in the case of penal laws as well as in the case of those of a strictly civil and private character. The legislature is considered to have had clearly before its attention the whole body of the law; and, so far from assuming that the lawgivers designed tacitly to override and abrogate existing acts, courts will *prima facie* presume that such a design, if it had existed, would have been clearly and definitely expressed in unambiguous words, and will endeavor to construe the new enactment in harmony with the old. Sedg. St. & Const. Law, p. 127; Bish. Writ. Law, § 154. "The question of repeal is largely one of intent; and if the two statutes can stand, and both have effect, they must be allowed to do so." *People v. Gustin*, 57 Mich. 407, 24 N. W. 156; *Dolan v. Thomas*, 12 Allen, 421; *State v. Alexander*, 14 Rich. Law, 247. "It is necessary to the implication of a repeal that the objects of the two statutes be the same. If they are not, both will stand, though they may both refer to the same subject." *U. S. v. Claffin*, 97 U. S. 546, 24 L. Ed. 1082; *People v. Platt*, 67 Cal. 22, 7 Pac. 1; *Coghill v. State*, 37 Ind. 111. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language, or there be something which shows that the intention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction. End. Interp. St. § 223; Bish. St. Crimes, § 151. The section we have quoted from the laws of 1891 is part of a statute of a very general nature, defining the crime of murder, its elements, degrees, and punishments; the punishments for the

crime of larceny, embezzlement, and feloniously receiving stolen goods, graded according to the value of the property stolen; the punishments for the crimes of robbery and burglary; and providing generally regarding the duties and functions of court and jury relative to its imposition of sentences and their recommendation of clemency. The evident purpose of this legislation was to make certain broad and far-reaching amendments of the general criminal law. On the other hand, it is perfectly clear that the object of the older act was not to prevent larceny in general, but to protect the ownership of a certain class of property, its title being "An act for the protection of live stock, and other purposes," and pertaining to no other subject than live stock. We suppose that in the opinion of the legislature the earlier act was needed, either to prevent a kind of thefts peculiarly easy of commission and difficult of discovery and punishment, or to afford special protection to the important industry of stock raising, or that the act was based upon both these considerations; and we must presume, that, in the passage of the later crimes act there was no intention to do away with this existing act, designed to effectuate a special purpose.

There being no reversible error in the judgment of the court below, its judgment of conviction is therefore affirmed.

PARKER and MCFIE, JJ., concur.

NOTE (By J. F. G.).—As to whether an *alibi* is an affirmative or negative defense, if it can be correctly considered as a distinctive defense, and as to whether the burden of proof, in any degree is shifted to the defendant, see case and notes:—11 Amer. Crim. Rep. 31-88 and 12 Amer. Crim. Rep. 13-31.

While there is some conflict in the decisions on this subject the weight of authority is to the effect, that the burden of proof does not in any degree shift to the defendant, but that an *alibi*, as it is termed, is simply rebuttal testimony.

The following should be accepted as logical propositions on this subject:—

1. That the term "*alibi*," which is defined as, "elsewhere" or "in another place," is misapplied; for, the issue in a criminal case is whether the defendant was present and committed the alleged crime: and not, whether he was at another specified place.
2. The burden is on the prosecution to prove beyond all reasonable doubt, the alleged presence of the defendant at the time and place of the alleged crime,—which burden remains on the prosecution throughout the entire trial.
3. The presumption of innocence endures until the case is finally sub-

mitted to the jury,—when, it becomes the province of the jury to determine, from all of the evidence, whether the defendant has been proven guilty beyond all reasonable doubt.

4. That a reasonable doubt is an essential element in the presumption of innocence;—hence,—being self-existent, is not *created* by proof of an *alibi*.

RIGGINS v. STATE.

116 Ga. 592.—42 S. E. Rep. 707.

Decided November 14, 1902.

LARCENY—ACCESSORY—VARIANCE: *Indictment against accused as accessory not sustained by evidence that he was a principal.*

1. An indictment charging one with the offense of being an accessory before the fact to the offense of simple larceny (a felony), in that he did counsel, command, and procure another to commit such larceny, is not supported by evidence showing that the person so accused was himself guilty, as the absolute perpetrator of the offense; and in the absence of evidence sufficient to show that the accused did so counsel, command, or procure the commission of the crime as charged, a verdict of guilty is not supported.
2. The verdict in the present case was contrary to the evidence, and the trial judge erred in overruling the motion for a new trial.
(Syllabus by the court.)

Error to Superior Court, Floyd County; Hon. W. M. Henry, Judge.

Charley Riggins, indicted as an accessory to larceny, and convicted, brings error. Reversed.

J. Santie Crawford, for the plaintiff in error.

Moses Wright, Solicitor General, for the State.

LITTLE, J. Riggins was indicted for the offense of being accessory before the fact to the crime of simple larceny. The specific charge is "that the said Charley Riggins, * * * being absent at the time of the commission of the crime, did procure, counsel, and command one Charley Hill" a certain mule described, and of a named value, to unlawfully take and carry away, "with intent to steal the same." The accused was put on trial, and the jury returned a verdict of guilty. He made a motion for a new trial on the grounds that the verdict was contrary to the law and the evidence, which being overruled, he

excepted. The evidence tended to show the following as the facts relating to the charge made against the accused: It was admitted that Hill had been indicted for the larceny of the mule, and had been tried and convicted. Adolphus Riggins, the owner of the mule, testified as to the larceny from his stable; that some time afterwards he ascertained, through information furnished by Hill, where the mule was, and secured its return. A witness (Rosa Saylor) said that just before the mule was stolen she saw Hill and the accused together at the house of the latter, and heard them talking, and that Hill said he was going to get the mule; that this was the night the mule was stolen; that after that Hill asked the accused where the mule was, and the accused told him it was in Dolph Riggins' stable; that subsequently Hill got a bridle and went off, and the next day Dolph Riggins was looking for his mule, and the accused helped him to hunt for it. Hill was introduced as a witness for the State, and testified that Riggins asked him if he would go and sell the mule, which he finally consented to do; that he was instructed by the accused to sell it for the best obtainable price; and that the first he saw of the stolen mule was when he was at the house of the accused, and came out in the yard, and the accused had it out there, hitched to a post. There was no issue as to the fact that the mule was stolen, and no question raised but that Hill had carried the mule away and sold it. The point insisted on in his brief by counsel for plaintiff in error is that there was no evidence to support the testimony of the accomplice, Hill. We think, however, that this question can hardly arise, for the reason that the accused was indicted as being accessory before the fact, while none of the evidence showed that he occupied that relation to the larceny. It is true that the evidence of the witness Rosa Saylor was to the effect that prior to the larceny Hill and the accused were talking about the mule, and the latter told the former where the mule was, and it is also true that it was shown that the accused assisted the owner of the mule in looking for it the day after the larceny; but this evidence is not inconsistent with the fact that the accused was with or without the co-operation of Hill, the absolute perpetrator of the offense, while the evidence of Hill, who was introduced as a witness for the State, shows absolutely that the accused was guilty of a larceny, while he (Hill) occupied the relation of an accessory

after the fact. Under no view of the evidence, then, could the accused have been convicted of the offense of counseling, commanding, and procuring Hill to steal the mule; and, if he could not, the verdict finding him so guilty was contrary to the evidence in the case.

One who is guilty of the commission of a crime as principal in the first degree commits an entirely distinct offense from that of an accessory before the fact, and one indicted as an accessory cannot be convicted on evidence proving him to be "present, aiding and abetting at the fact." 1 East, P. C. 352; Leach, Crown Law 515. In the case of *Hately v. State*, 15 Ga. 346, it was ruled that "he who procures, counsels, commands or incites his clerk or agent to commit a crime in his absence is guilty as an accessory *before* the fact, and cannot be convicted upon an indictment which charges him with having jointly, with his clerk, committed the offense as principal." In other words, one who counsels, commands, or procures another to commit a crime, but is absent at the time of its commission, is not a principal, and cannot be convicted as such. In some of the States the distinction has been abolished, and many decisions can be found which seem somewhat to confuse the principle upon which the distinction between the two offenses rests; but in the cases which have come under our observation, where this is true they deal with facts showing that, as the result of a conspiracy, all the persons charged were the absolute perpetrators, and where the persons charged as accessories were declared to be present aiding and abetting the commission of the crime. In the present case, however, the indictment distinctly alleges that plaintiff in error was absent at the time of the commission of the crime; that his guilt consists only in having counseled, procured, and commanded said crime to be done. A verdict rendered on evidence that he was the actual perpetrator of the crime does not support the charge made in the indictment; and in the absence of evidence that the accused counseled, procured, or commanded the crime to be committed, such verdict cannot be sustained, because it is contrary to the evidence.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

TRICE V. STATE.

116 Ga. 602.—42 S. E. Rep. 1008.

Decided December 9, 1902.

LARCENY FROM DWELLING HOUSE: *Variance as to ownership of the house*

1. An accusation charging a larceny from the dwelling house of a named person is not sustained by proof that he was the owner in fee of a hotel, which he rented to and which was conducted by another, and that the theft was committed in a room of this hotel which was occupied by a guest of the latter.
(Syllabus by the court.)

Error to City Court of Griffin; Hon. E. W. Hammond, Judge.
Joe Trice convicted of larceny from a dwelling house, brings error. Reversed.

Thos. W. Thurman, for the plaintiff in error.

O. H. P. Slayton, for the State.

SIMMONS, C. J. The plaintiff in error, Joe Trice, was in the court below convicted of the offense of larceny from the house. The accusation under which he was brought to trial charged that he "did, with force and arms, unlawfully enter the dwelling house of J. T. Gray, and, after so entering, did wrongfully and fraudulently take and carry away a certain pistol, in said house stored, of the value of ten dollars, the personal property of T. B. Borom, with intent then and there to steal said pistol." The sole question presented for our determination is whether or not this charge was sustained by the evidence upon which the State relied for a conviction. The person in whom the ownership of the property alleged to have been stolen was laid testified:—"I lost a pistol worth twelve or fifteen dollars. It was taken from my room in the Gray House, in the city of Griffin." J. T. Gray, who was alleged to be the owner of the dwelling house wherein the larceny was committed, testified: "The house where the pistol was taken is a hotel known as the 'Gray House,' and is run by Mrs. Barham. I rent the house to her, and board with her. I pay her board, and have no control over the house. Mrs. Barham controls the house." The precise point to be determined, therefore, is, was Gray, rather than Mrs. Barham or T. B. Borom, properly alleged in the accusation to be the owner of the dwelling house to which these witnesses referred? "The meaning of 'ownership'

varies with the offense. Burglary is not a disturbance to the fee of the place as realty, but to the habitable security. Therefore, in burglary, 'ownership' means any possession which is rightful as against the burglar." 2 Bish. New Cr. Proc. § 137. "In general, possession and occupancy by the alleged owner are all that are required. While he need not own the fee,—he need not even pay rent,—'it is enough that it was his actual dwelling house at the time.' Even a possession unlawful as against the person claiming title, but lawful as against the burglar, will suffice." Id. § 138. "And as a general rule the ownership, so far as burglary is concerned, is in a lessee or other tenant having title, and not in the owner of the fee." 1 Whart. Cr. Law (10th Ed.) § 798. Accordingly an accusation charging that one burglariously entered the dwelling house of a named person is to be understood, not as referring to him as the owner of the fee, but as alleging that he had possession of and control over the house, and occupied it as a dwelling. Indeed, our Penal Code (section 149), which defines the offense of burglary, evidently contemplates that the person who occupies, rather than another who holds the legal title to, but is not in possession of, a dwelling house, shall be regarded as the owner of the same; for that section, in express terms, declares that "a hired room or apartment in a public tavern, inn, or boarding house, shall be considered as the dwelling house of the person occupying or hiring the same." Such has been the construction which this court has heretofore put upon the language of that section. *Houston v. State*, 38 Ga. 165; *Yarborough v. State*, 86 Ga. 396, 12 S. E. 650, and cases cited.

Under our statute, "larceny from the house is the breaking or entering any house with the intent to steal, or after breaking or entering said house, stealing therefrom anything of value." Pen. Code, § 178. This definition of this offense makes it so close akin to that of burglary, we can see no reason for holding that a distinction is to be drawn between an accusation charging a larceny from the house and an indictment for burglary, in so far as an allegation as to the ownership of a particular dwelling house is concerned. Neither offense involves "a disturbance to the fee of the place as realty;" so it would seem somewhat absurd to hold that the ownership of a dwelling alleged to have been burglariously entered should be laid in the actual occupant, and

not in the owner of the fee, if he was not in possession, whereas the latter should be alleged to be its owner in the event of a mere larceny therein committed. Certain it is that no such distinction has heretofore been recognized by this court. On the contrary, it was, in *Markham v. State*, 25 Ga. 52, held that "the possession and occupancy of a house by a person as a dwelling house is sufficient evidence of ownership thereof in that person to support an allegation to an indictment for larceny from the house that the prisoner entered the dwelling house of that person." There it appeared that one Thomason was conducting a boarding house, wherein one Parker and the accused "roomed together," and from the room they occupied a watch belonging to Parker was stolen. The trial judge declined to charge the jury "that, if they believed from the evidence that the watch was taken from the hired lodgings of a boarder in the house of Thomason, that the indictment should have so charged it, and that it was not sufficient to have charged that the watch was taken from the house of Thomason." This court appears to have recognized that this charge, had there been sufficient evidence upon which to predicate it, ought to have been given; for, in passing on an assignment of error touching the matter, Judge McDonald said (page 54): "There was no evidence that the room from which the watch was stolen was the hired lodgings of a boarder. A boarder lodged there, but there was no evidence that he hired that particular room. There being no evidence to support the request * * * to charge the jury, it was not error in the presiding judge to refuse it." As regards the present case, we are of the opinion that the State did not prove the charge as laid, the evidence disclosing that Gray had rented the hotel to Mrs. Barham, and exercised no control over it, and that the pistol which was stolen was taken from a room therein not occupied by him, but by another, who, while a witness on the stand, several times referred to it as his. In fact, it does not affirmatively appear that Gray occupied any room in the building. That he was not the resident owner of it, in the sense charged in the accusation, we hold without difficulty or hesitation.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

STATE v. BEATY.

62 Kan. 266—62 Pac. Rep. 658.

Decided November 10, 1900.

LARCENY—CHARACTER—OWNERSHIP LAID IN SERVANT: *Error to prove in rebuttal, that defendant and others had bad characters—Ownership should not be laid in servant of owner.*

1. A defendant on trial for larceny introduced evidence tending to establish his good character for honesty. Witnesses on behalf of the State were permitted to testify in rebuttal that the accused, together with three other persons not on trial, sustained bad reputations in that respect. *Held error.*
2. A person having the mere custody or temporary use of personal property, in the capacity of servant of the owner, and who could not maintain an action for trespass, as bailee, for injury to the same, is not properly designated as the owner in an information for larceny. (Syllabus by the court.)

Appeal from District Court, Finney County; Hon. William E. Hutchinson, Judge.

E. E. Beatty, convicted of larceny, appeals. Reversed.

Sutton & Scates, W. R. Hopkins, and T. F. Garver, for the appellant.

A. A. Godard, Attorney General, and G. L. Miller, for the State.

SMITH, J. The appellant was convicted of grand larceny. The offense consisted of cattle stealing. He introduced testimony showing his good reputation for honesty, and the State, in rebuttal, attempted to prove his bad character in that respect. One John Dacy, on behalf of the prosecution, testified, over the objection of the defendant, as follows:

"Q. Do you know the reputation of the Dunns and Beatys in that community for honesty and fair dealing, in connection with their cattle business? Now, do you know their reputation, including John Dunn, George Dunn, Will Beaty, and the defendant, E. E. Beatty, for honesty and fair dealing in connection with the cattle business, in the community where they were carrying on their business? Do you know what people say about it? A. Yes, sir.

"Q. Judging from what they generally say, is that reputation good or bad? A. It is bad."

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Frank Hutchinson testified:

"Q. Are you acquainted with the general reputation of the Beatys and Dunns, including the defendant, E. E. Beaty, William Beaty, John Dunn, and George Dunn, in the community where they carried on their business, as to honesty and fair dealing; that is, do you know what people generally say of them? A. I know what the people say of them in general.

"Q. What is that reputation,—good or bad? A. They are spoken of generally as a pretty tough outfit.

"Q. Was that reputation good or bad? A. Bad."

Another witness, in response to like questions, testified that the persons named had the reputation in the community where their stock ranged of not doing the right thing in the cattle business.

We think that the admission of this testimony was prejudicial to the rights of the accused, and violative of the rules of evidence applicable to the introduction of impeaching testimony. The defendant had produced witnesses who testified to his own good reputation. He did not attempt to show what reputation was borne by the Dunns or William Beaty. Such evidence would have been inadmissible. They were not on trial, nor were they accused in the information. To permit an inquiry into their reputation was to import into the case a collateral issue. Every man is supposed to be able always to support his own general reputation, but ought not to be expected to be ready to defend the character of those with whom he associates. It can be seen how this trial might have been prolonged by an investigation into the general reputation for honesty of the Dunns and William Beaty. Such inquiry is too remote.

In the case of *State v. Staton*, 114 N. C. 813, 818, 19 S. E. 96, 98, the accused was tried for arson, and it was proved that he sold cotton taken out of the barn that was burned to one Warren, and the defendant proposed to prove that Warren was a man of good reputation. The latter was not examined as a witness in the case.

The testimony was rejected. The court said:

"While the character of a witness may be shown for the purpose of sustaining or impairing the force of his testimony, it does not tend to enlighten the jury upon the question of guilt or innocence to know whether a person who is neither party nor witness, but is only mentioned in the confession of one accused

of crime as the receiver of stolen goods, is of good or bad reputation." See, also, *Redus v. Burnett*, 59 Tex. 576.

The case of *Walls v. State*, 125 Ind. 400, 403, 25 N. E. 457, 458, was a prosecution for highway robbery. The defendant offered to prove that one Belcher, his alleged accomplice, was at the time of the robbery a person of good character for honesty, but the court refused to admit such evidence. It was said:

"In this we do not think the court erred. Belcher was not on trial, and the question then under investigation related to the guilt or innocence of the appellant, and did not necessarily involve the guilt or innocence of Belcher. For the purposes of the trial of this cause, Belcher was a stranger to the record, and his character for honesty was of no more importance than the character of any other third person."

In the case of *Omer v. Com.*, 95 Ky. 353, 362, 25 S. W. 594, 596, it was said:

"The appellant contends that he should have been permitted not only to establish his own good character among the people of the community,—as he did do,—but also the good character of each of the parties indicted with him. At first blush it might seem plausible that, as it was sought to make the accused responsible for the acts of those parties, he should be permitted to show their good character, as rebutting the idea of conspiring with such men; but the accused alone was on trial, and his own conduct and character were involved. The rule would have to work both ways, and a good man caught, ever so innocently, in bad company, might be made to suffer from the establishment of such a rule, or if presumption of guilt or innocence might be indulged in according as the party charged was in good or bad company."

In the first count of the information defendant is charged with stealing property belonging to and in the possession of Don Otto; in the second count it is alleged that the property belonged to E. M. Otto, in the possession of Don Otto, holding the same for said E. M. Otto; and in the third count the property is charged to belong to E. M. Otto, held and possessed by Don Otto for E. M. Otto and the Ben Holmes Commission Company. At the close of the testimony the county attorney elected to rely for conviction upon the first count. We have examined the testimony, and do not think it was satisfactorily shown that Don

Otto was more than a servant of E. M. Otto, the owner, or had anything beyond a mere temporary custody and use of the property. Under the evidence before us, Don Otto could not have maintained an action for trespass, as bailee, for an injury to the cattle. 12 Enc. Pl. & Prac. 963, 964. The testimony as to ownership tended more nearly to sustain the allegations of the third count of the information.

We have considered the other assignments of error. Appellant cannot complain of the amendment of the original information. The claim that the court was without jurisdiction is not well founded. *State v. Suppe*, 60 Kan. 566, 57 Pac. 106.

The judgment of the court below will be reversed and a new trial ordered.

STATE V. ACEBAL.

110 La. 129—34 So. Rep. 303.

Decided April 13, 1903.

LARCENY—OWNERSHIP—PRACTICE: *Sufficient to prove property in the ostensible owner—Finding of jury as to ownership binding on the Supreme Court—What is not newly discovered evidence.*

1. It is not the province of this court to determine whether the jury were right or wrong in their determination of the issue of fact, presented in the matter of the ownership of the stolen property.
2. It is rather as part of the description and to identify the stolen things, that an indictment is required to name the owner. Hence, to lay the title in the ostensible or apparent owner suffices.
(Syllabus by the court.)

Testimony of persons acquainted with defendant; and known to him to be cognizant of the facts, is not newly discovered evidence.
(Additional syllabus by J. F. G.)

Appeal from Criminal District Court, Parish of Orleans; Hon. Frank D. Chrétien, Judge.

Miguel Acebal, convicted of larceny, appeals. **Affirmed.**

Frank Theodore Echezebal, for the appellant.

Walter Guion, Attorney General, *J. Ward Gurley*, District Attorney and *S. A. Montgomery*, Assistant District Attorney, for the State.

BLANCHARD, J. The accused was proceeded against on the charge of grand larceny. The things stolen were articles of jewelry, including three miniatures, and the same were alleged to be "of the goods, property and chattels of Mrs. George DeGaham."

He was found guilty as charged, and from a sentence of one year at hard labor appeals.

Ruling—The accused, through counsel other than those who defended him at the trial, applied for a new trial, averring the verdict returned to be contrary to law for several reasons, one of which was that the prosecution had failed to prove one of the principal ingredients of the crime of larceny, to wit:—ownership in the party named as owner in the bill of information.

His contention is that the ownership being laid in Mrs. DeGaham, and she being a married woman not separate in property from her husband, the ownership should have been laid in the husband, and that proof the things belonged to the community did not authorize a conviction under the information laying their ownership in the wife.

On the trial of this motion for a new trial he offered the stenographic report of the testimony of Mrs. DeGaham, the prosecuting witness, taken at the trial, and referred to the following as sustaining his contention that the property was community in character:—

"Question (by the State): Are you married?

"A. Yes, sir.

"Q. Are you and your husband separate in property?

"A. No, sir.

"Q. It is here charged that certain articles belonging to you were stolen, did they belong to you or your husband?

"A. To me and my husband."

The foregoing is the only part of the examination of Mrs. DeGaham which counsel quotes in his brief, though all of her testimony comes up attached to his bill of exceptions. Her examination was very lengthy and the three questions and answers given above occurred right in the beginning. He does not give the fourth question and answer, which were:—

"Q. It is your property?

"A. Yes, sir."

Here then was a question of fact—the ownership of the prop-

erty—and on the proof administered the jury found its ownership to be in Mrs. DeGaham. They must have been satisfied it was her separate property.

It is not the province of this court to determine whether the jury were right or wrong in their determination of the issue thus presented.

When she answered first that the things stolen belonged to her and her husband, she may have meant that some of them (for there were many articles) belonging to her separately and some of them to her husband, or to the community.

If some of them were her separate property, it sufficed to sustain the conviction.

Her final answer on this branch of her examination was that the property stolen was hers.

It was for the jury—not this court—to determine the meaning to be attached to this answer of hers. By their finding the accused guilty they must have construed it to mean the things stolen, or some of them, were her individual property.

There is here quite sufficient of testimony, as matter of law, to sustain the conviction.

Besides which, this court has repeatedly held that in criminal prosecutions for larceny it suffices to lay the title of the property stolen in the ostensible or apparent owner, and that the felonious taking, more than the perfect title of the alleged owner, forms the essence of the issue presented to the jury. *State v. Lewis*, 49 La. Ann. 1208, 22 South. 327; *State v. Everage*, 33 La. Ann. 120; *State v. Kane*, 33 La. Ann. 1269; *State v. Hobgood*, 46 La. Ann. 855, 15 South. 406.

In *State v. Harris*, 42 La. Ann. 981, 8 South. 530, the court said:—

“The ownership in a *particular* person of the property stolen is not of the essence of the crime of larceny, though it is of its essence that it should be alleged and proven to have been the property of another than the accused.”

And in *State v. Hanks*, 39 La. Ann. 234, 1 South. 458, it was held that:—

“The ownership of a particular person is not an essential ingredient of the crime of larceny, which is simply the felonious taking and carrying away of the personal goods of another; and even if the owner be unknown, the offense may be properly

charged and sustained. The essential facts constituting the crime of larceny of a particular, specified horse are not in any manner, affected by the question whether the horse was the property of Seigne Duhon or of Cecile Duhon. It is sufficient if the horse was the property of another. The *identity* of the horse charged to have been stolen is the important thing in determining whether the offense proved is the offense charged."

See, also Bishop's New Criminal Procedure (Ed. 1896) vol. 2, § 721; also, section 726, No. 2; *Commonwealth v. McLaughlin*, 103 Mass. 435.

So we hold there is sufficient in the record relating to the ownership and possession of the jewelry to sustain this conviction, without taking into consideration the Judge's action in ordering the stenographic report of Mrs. DeGaham's testimony corrected so as to show more fully what the Judge affirmed and the District Attorney testified to, viz.:—that she had stated the property was hers individually—something omitted inadvertently by the stenographer.

The second bill of exceptions relates to the Judge's refusal to grant a new trial on the ground of newly discovered evidence. Three witnesses were produced and sworn and gave the testimony which is that referred to as newly discovered evidence.

The Judge states the motion was refused because the evidence offered as newly discovered evidence was not newly discovered; that the facts intended to be proved were known to the accused long before the trial; that it was shown he was intimate with the witnesses who are relied on to give the newly discovered evidence; and that he well knew before his trial they were cognizant of the facts which he now sets up as newly discovered evidence.

There is an abundance of material in the record to satisfy us that this appreciation of the situation by the Judge was correct.

It is ordered that the verdict, sentence and judgment appealed from be affirmed.

WEIGREFE V. STATE.

66 Neb. 23—92 N. W. Rep. 161.

Decided October 22, 1902.

LARCENY: Evidence sufficient—Proof of nonconsent.

1. Evidence examined, and held sufficient to support a verdict of guilty of larceny, as found and returned by the jury.
2. In the trial of an accused charged with the larceny of property from two joint owners, where one acquainted with the facts and circumstances surrounding the taking testifies thereto, and that the taking was without the knowledge and consent of the owners, and the defendant, testifying in his own behalf, denies any knowledge of or participation in the alleged larceny, it cannot be said the evidence is insufficient to support a verdict of guilty, on the ground that nonconsent is not sufficiently established.

(Syllabus by the court.)

Error to District Court, Rock County; Hon. Harrington, Judge.

George Weigrefe, convicted of larceny, brings error. Affirmed.

J. S. Davisson and *R. R. Dickson*, for plaintiff in error.

Frank N. Prout, Attorney General, *Norris Brown*, Deputy Attorney General, and *William B. Rose*, Assistant Attorney General for the State.

HOLCOMB, J. The plaintiff in error (defendant below) was tried, and by a jury found guilty of the larceny of a two year old heifer, and by the court sentenced to imprisonment in the penitentiary for two years. He prosecutes error to have the record of his conviction reviewed, and the judgment reversed. The only question presented for our consideration is the alleged insufficiency of the evidence to support the verdict of guilty returned by the jury. The argument in support of this contention is presented in a two-fold aspect: First, it is claimed that the evidence will not support a verdict of guilty of the offense charged in the information; and, second, because the property alleged to have been stolen belonged to two joint owners, one of whom only was called as a witness, it is insisted the evidence will not warrant a conviction, when the other joint owner was not called to prove that the property was taken without his knowledge or consent, or, in other words, the nonconsent is not sufficiently established by the evidence.

Regarding the alleged insufficiency of the evidence generally, it is disclosed by the record that the State prosecuted on the theory that the defendant and one Pope committed the larceny while Pope was removing his cattle from defendant's herd and range, where they had been kept for the summer season by the defendant. To sustain its charge, the State called Pope and his son, a lad of 15 years of age, who testified to facts regarding the taking of the animal alleged to have been stolen, which, if believed by the jury, warranted the inference that the defendant and the elder Pope were both guilty of the larceny. Pope, it appears, had already pleaded guilty to the charge. To meet the testimony of the character mentioned, the defendant and his wife were called as witnesses, and testified to a contrary state of facts, the substance of which was that the animal claimed to have been stolen was not with or a part of defendant's herd, or the cattle in his possession, at the time Pope removed those belonging to him. We are asked to say that the testimony of Pope and his son is untrue, and that the defendant's version of the transaction is the correct one. This we cannot do without denying to the jury, as triors of fact, the right to judge of the weight and credibility to be given the testimony of the different witnesses. It is for the jury, and not the court, to say who of the different witnesses were testifying truthfully, and who were in error. Whether it be an accomplice, or a witness in his ordinary capacity as such, it is for the jury to determine, after a careful examination of all the evidence, the truth of the matter in controversy; and a conviction may rest on the uncorroborated testimony of an accomplice, if, when considered with all the evidence in the case, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Olive v. State*, 11 Neb. 1, 7 N. W. 444; *Lamb v. State*, 40 Neb. 312, 58 N. W. 963; *Lawhead v. State*, 46 Neb. 611, 65 N. W. 779. Where the testimony is conflicting, the credibility of witnesses and the weight to be given their testimony is a matter for the jury to determine, and, when it is convinced beyond a reasonable doubt of the defendant's guilt, it is not for a reviewing court to say that it must also be convinced from the record beyond a reasonable doubt before the verdict can be upheld. *Palmer v. People*, 4 Neb. 68; *Schlencker v. State*, 9 Neb. 241, 1 N. W. 857; *Carleton v. State*, 43 Neb. 373, 61 N. W. 699.

On the other phase of the question, it appears that one of the

partners or joint owners of the property claimed to have been stolen testified positively and directly that the property was taken without the knowledge or consent of the owners. He was at the time looking after the business of the firm, had control of their cattle, and was acquainted with the facts and circumstances surrounding the transaction. The other joint owner was not called as a witness, nor do we regard it as necessary, in order to make out a *prima facie* case on the part of the State, in showing that no consent was given to the defendant or to any one to take the animal. In any view we may take of the subject, there was positive evidence of nonconsent. All the circumstances surrounding the alleged larceny were inconsistent with a taking with the consent of the owners, and want of consent may be inferred from circumstances shown in evidence, as well as by direct testimony that none was given. *Rema v. State*, 52 Neb. 375, 382; 72 N. W. 474. In this case the defendant and his wife took the stand in his own behalf, and denied any knowledge of or participation in the alleged offense, and thus eliminated so far as he was concerned, the question of nonconsent. His theory was that he had no connection with the matter whatever, and it seems reasonably clear from consideration of the entire record that the evidence cannot be said to be insufficient to support a verdict because nonconsent is not shown. The evidence justifies the inference that the taking was felonious.

The judgment should be, and accordingly is, affirmed.

STATE V. WONG QUONG.

27 Wash. 93—67 Pac. Rep. 355.

Decided December 28, 1901.

LARCENY: *Sufficiency of the evidence—Nonconsent of owner.*

1. The evidence tersely stated in the opinion, held sufficient to substantiate a conviction.
2. That the alleged stolen property was taken without consent, may be shown by facts and circumstances, without testimony from the owner.

Appeal from Superior Court, Walla Walla County; Hon. Thos. H. Brents, Judge.

Wong Quong, convicted of grand larceny, appeals. Affirmed.

George T. Thompson and W. T. Dovell, for the appellant.
Oscar Cain, for the State.

PER CURIAM. The appellant was convicted of the crime of grand larceny. From the judgment and sentence pronounced thereon, he appeals. The case is here on the objection that the evidence is insufficient to justify the verdict. From the record it appears that the appellant was working at the house of one B. D. Crocker, in the city of Walla Walla, at which there was stopping temporarily a Mrs. O'Neil, a sister of Mrs. Crocker. Mrs. O'Neil was the owner of a ring in which was set a diamond of considerable value, which ring she kept in a tray in her room when not wearing it. When preparing to leave the house of her sister, it was discovered that the diamond was gone; having been removed from its setting in the ring. This was on Sunday. On the Friday before, towards evening, Mr. Crocker, while in the library of the house, heard a peculiar noise in the upstairs part of the house, "as if a Chinaman was shuffling with his feet, or a child barefooted." On going to ascertain the cause of the noise, he heard the weights of a window strike against the sides of the casing, and, on reaching Mrs. O'Neil's room, found the window open, which he says was a very unusual thing. This window lead to a porch which extended around the house, having a door opening onto it from a hall at the head of the kitchen stairway. The appellant had access to this room, as well as other rooms in the house; being employed as a house servant. The diamond was found on and taken from the possession of the appellant at the time of his arrest. It was shown that he had the diamond, with some money, in a belt which he wore around his waist, and that, while freely giving up his money, he attempted to secrete the diamond from the officer who was searching him. Testifying in his own behalf, he said that he found the diamond near the walk leading to the porch of Mr. Crocker's house, that he did not know it was of value, that no inquiry was made about it of him, and that, had such inquiry been made, he would have shown it to the person so inquiring. Mrs. O'Neil was not present to testify at the trial, and, while the State offered some evidence tending to explain her absence, the testimony was stricken on motion of the appellant.

This is substantially all that appears from the record tending

to connect the defendant with the crime charged. The principal objection urged is that it fails to show nonconsent of the owner of the property to the taking. But nonconsent of the owner of property alleged to have been stolen is simply one of the elements of larceny, to be proven by the same means and in the same manner as all the other elements must be proven. It may be shown by the circumstances of the case; and the question of the sufficiency of such circumstances to establish the fact is usually one for the jury, and not for the court. It will not do to say that it can be proven only by the owner. The public have an interest in seeing that the guilty are punished, and this rule would permit the escape of all at whose trial the State was unable to procure the attendance of such owner. The State, when the charge is larceny, must satisfy the jury beyond a reasonable doubt that a larceny has been committed. This it does from the whole of the evidence, and, if that whole tends substantially to support the entire issue, the Appellate Court cannot say the jury were not justified in their finding. In the case before us, we think the evidence tending to cover all of the elements necessary to constitute larceny.

The judgment is affirmed.

FILSON V. TERRITORY OF OKLAHOMA.

11 Okla. 351—67 Pac. Rep. 473.

Decided September 6, 1901.

LARCENY—EVIDENCE AS TO VALUE NONCONSENT AND VENUE: *Market value of used articles of personal property—Expert witnesses—Judicial notice as to venue—Method of arriving at verdict—When a verdict is sustained by evidence.*

1. The reasonable market value of the property stolen is the true criterion for determining the grade of larceny.
2. Where a witness testifies generally to the value of an article in common use, it will be assumed that the market value is meant, unless it appears from the testimony of the witness that he bases the value given by him upon some other consideration.
3. Expert witnesses are not required to prove the reasonable market value of chattels in common use, and the reasonable market price of which is within the knowledge of persons of ordinary intelligence and experience.
4. It is not improper to permit proof of the purchase price of an article

purchased in the usual course of trade, which has been used but a short time, as well as its condition at the time, and its salable value at a secondhand dealer's, as elements for the consideration of the jury in determining the reasonable market value of such article.

5. The venue of an offense must be proved as charged in the indictment, but direct and positive proof is not required.
6. The courts of this Territory will take judicial notice that Canadian County is in Oklahoma Territory, and proof that an act was committed in Canadian County will sustain the allegation that such act was committed in Canadian County, Oklahoma Territory.
7. In order to support a conviction for the crime of larceny, the proof must show that the property which is the subject of larceny was taken without the consent of the owner; but direct and positive declarations of the owner are not required. If all the facts and circumstances in evidence connected with or surrounding the taking will warrant the reasonable and rational inference that the property was taken without such consent, then such verdict will not be disturbed for lack of direct proof.
8. This court will not assume that the verdict of a jury as to value is the result of improper mathematical calculations, where the evidence is ample to warrant their finding, and there is no evidence of misconduct.
9. Where there is competent evidence reasonably tending to support every material averment in an indictment, this court will not disturb a verdict of guilty upon the weight of the testimony.
(Syllabus by the court.)

Error to District Court, Canadian County; before Hon. C. F. Irwin, Trial Judge.

Goldie Filson convicted of larceny, brings error. Affirmed.

D. C. Lewis, W. K. Snyder and Baldwin & Phelps, for plaintiff in error.

J. C. Strang, Attorney General, for the Territory.

BURFORD, C. J. The plaintiff in error was tried and convicted in the District Court of Canadian County for the larceny of a set of double harness. The jury found the value of the property to be \$21, and returned a verdict finding the prisoner guilty of grand larceny, and judgment was rendered on the verdict. From this judgment the prisoner appeals.

It is contended by counsel for plaintiff in error that the true rule for determining value of stolen property is the market value of the goods taken at the time and place of the alleged larceny. There is no room for argument on this question, and the prosecution does not contend for any different rule. The trial court

instructed the jury that they must find the fair cost value of the harness on the market was more than \$20 before they could find the prisoner guilty of grand larceny. Conceding this to be the correct rule, was it violated in this case? It is claimed that the witnesses for the prosecution were not qualified to testify upon the subject of value. The owner of the harness testified that he purchased the harness new, and paid \$34 for them without collars, and that they were worth \$27 or \$28 at the time of the larceny. The witness was a farmer, who had used the harness for about six months. Other witnesses were permitted to testify as to the value of the harness. We do not think this a question calling for expert testimony. Farmers who buy and use property are generally competent to testify as to its value; and, when values are spoken of in a general way, market values are generally meant. This court said in the case of *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389: "When one speaks generally of values of chattels, it means their value in the market. This is inferred, unless a different basis of value is fixed by the witness, or it is apparent that the witness bases his value on a different foundation." It was not error for the trial court to permit the owner of the property to testify what the harness cost new. It was shown that the harness had only been used for a short time, and had been well cared for. The jury might properly consider their cost new, and their use, and decrease in value by their use, in determining their reasonable value at the time of taking. While the reasonable market value of the property at the time of the larceny was the question to be determined by the jury, any facts which would reasonably tend to enable them to intelligently determine such question was competent and proper. The first cost of the harness when new, what they sold for at the store, what they sold for after being used a short time, what a second-hand dealer would pay for them, and what such dealer would expect to sell them for, their condition at the time they were taken, and how long they had been in use, were all matters that the jury might consider in determining the reasonable market value of the harness at the time of the taking. And, taking the purchase price of the harness when new, and deducting a reasonable sum for their deterioration in value by reason of their use and damage, would not be an improper method of arriving at the fair market value. The price that a second-hand dealer would pay for such articles

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is not to be taken as the only means of proving value. As appears from the evidence of such witness in this case, they will not pay the full market value for such articles. They buy to sell again, and expect to make a profit. They also estimate that they may keep the goods in stock for some time before finding a purchaser, and they expect eventually to sell the article for less than its actual market value in order to induce purchasers to take second-hand goods. There is too much of a tendency to require experts to testify as to matters of everyday occurrence and common knowledge. The average farmer at this day and age is possessed of sufficient intelligence and experience to enable him to tell the market prices of farm products, live stock, and those articles he makes common use of in his business, and generally is better qualified to fix the values than persons who are engaged in some specialty, and buy only when they can get a good bargain, and then sell the article at less than its value in order to encourage trade. The jury had competent and proper evidence before it from which to determine the reasonable market value of the harness. The court properly instructed them, and we find no reason to interfere with their finding.

It is next urged that the proof does not show that the property was taken without the consent of the owner. There is no ground for such contention. The owner testified that he put the harness in the barn late in the evening, and went to the house for his supper. In a short time he returned to the barn, and found his harness had been stolen. He immediately got on a horse and followed a wagon that had passed while he was at supper. He followed the wagon several miles, and overtook it and the prisoner with it. He was held up by the prisoner and another person in company with him, and gagged, to prevent him from giving an alarm. While they were thus engaged, two other persons were seen approaching, and the prisoner and his companion abandoned the prosecuting witness, and one ran away, while the prisoner got in the wagon and drove on. He then gave the alarm, and the people in the vicinity turned out to help him find his harness, and did find them hid in the weeds near the road, at a point where the defendant's shotgun was found in the road; and which had been lost out of the wagon. If this was not sufficient to warrant the jury in the reasonable inference that the harness was

taken without his consent, nothing short of his direct and positive declarations to that effect would have been sufficient.

The rule is unquestioned that the proof must show that property alleged to have been stolen was taken without the consent of the owner, but direct and positive proof is not required. The proof of such facts and circumstances connected with and surrounding the taking as will support the reasonable and rational inference that the property was taken without the consent of the owner is sufficient to sustain a conviction, the other material facts being sufficiently established.

The next objection made to the verdict is that the venue was not proven. The prosecuting witness testified that he lived one mile north of Yukon, in Canadian County, and that the property was stolen from his barn at his home. The court takes judicial knowledge that Canadian County is in Oklahoma Territory, and the proof was sufficient on that point. *Harvey v. Territory* (decided this term) 65 Pac. 837.

We are told by counsel for plaintiff in error that the verdict of the jury was a compromise verdict, the result of mathematical juggling by the jury, and counsel very ingeniously take the amounts \$27 and \$15 and divide by two, and get the result, \$21, the value as found by the jury. We have no right to assume that the jury arrived at their verdict in any such manner. The evidence as to value varied from \$12 to \$28, and the jury had the right, after seeing the harness, which was exhibited to them, and considering all the testimony relating to values, to fix such value at any sum within the maximum and minimum values fixed by the witnesses; and the fact that they found the property to be worth \$21 is of itself no evidence of improper conduct, and there is nothing else in the record upon which to base even a suspicion, much less a judicial finding, of misconduct.

The final contention is that the evidence of the Territory is not sufficient to sustain the verdict. There is competent evidence tending to support every material averment in the indictment. The jury were warranted in finding the verdict they returned, and, in our judgment, the evidence amply sustains the verdict.

Counsel for plaintiff in error have cited a large number of authorities on each of the propositions argued in their brief. We find no fault with the law as contained in these authorities. In so

far as applicable, they are in harmony with the law as given to the jury in the instructions in this case.

We find no error in the record, and the judgment of the District Court of Canadian County is affirmed, with directions to immediately proceed to carry out the judgment of the court, and that the time of sentence of the prisoner shall begin when he shall be delivered to the warden of the penitentiary. All the justices concur, except IRWIN, J., who tried the cause below, not sitting.

SMITH V. STATE.

10 Wyo. 157—67 Pac. Rep. 977.

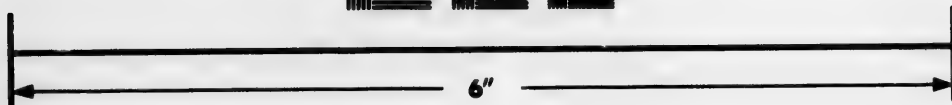
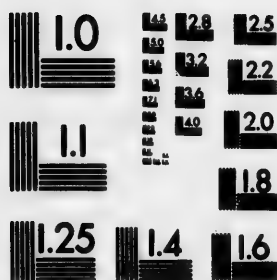
Decided February 11, 1902.

LARCENY—TESTIMONY OF ACCOMPLICE—EXCEPTIONS: *Necessity to instruct as to testimony of accomplice—Corroboration of such testimony—Instructions thereon—Exceptions to instructions.*

1. A jury may convict on the uncorroborated testimony of accomplice, there being no law in the State of Wyoming to the contrary.
2. The court should not give a peremptory instruction to acquit, because a case is based on the uncorroborated testimony of an accomplice; but it is questionable whether a jury has a right to return a verdict of guilty on such uncorroborated testimony; "and the authorities are uniform that they should not do so."
3. Greenleaf, quoted with approval as follows:—"Judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge. And, considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice; not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice."
4. It was error to instruct, that the jury should find the defendant guilty, if the jurors believed the accomplice spoke the truth and was corroborated on any material point at issue.
5. In this case the testimony was in sharp conflict. Part of the accomplice's testimony might have been true and was corroborated,—such as concealment and the finding of the hide of the stolen steer,—and yet not create any special inference against the accused. Such being the case the court erred in refusing an instruction, that such finding was not a corroboration.
6. It is sufficient in a motion for new trial, to assign error as to in the giving or refusing of instructions, without stating that exceptions were taken at the time.



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Error to the District Court, Converse County; Hon. Richard H. Scott, Judge.

Lewis Smith convicted of the larceny of a steer, brings error. Reversed.

Charles F. Maurer and F. H. Harvey, for plaintiff in error.

W. F. Mecum, County and Prosecuting Attorney, and *J. A. Van Orsdel*, Attorney General, for the State.

CORN, J. The defendant, Lewis Smith, was convicted of the larceny of a steer. The case for the prosecution depended upon the testimony of an accomplice, Thomas Black, and it is claimed there was error in the charge of the court touching the duty of the jury in considering his testimony.

The court, at the request of the State, gave to the jury four instructions upon the subject, as follows:

"(1) It is claimed on the part of the defense that Thomas Black, one of the State's witnesses, is an accomplice in the crime; therefore the court will instruct you upon the subject of an accomplice. An 'accomplice' is defined as one who is associated with others in the commission of a crime, all being principals, and the test, in general, to determine whether a witness is or is not an accomplice, is the inquiry: could the witness himself have been indicted for the offense either as principal or accessory? The question of whether a witness is an accomplice or not is for the jury to determine.

"(2) Should you find the said Thomas Black to be an accomplice in the crime, and also find that his testimony is corroborated by some other evidence which tends to confirm his testimony upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant, and if it appears that the said Thomas Black has testified to the truth in some material particular, the jury may infer that he has in others.

"(3) The credibility of an accomplice is a question for the jury, as is that of any other witness, and you have a perfect right to accept it or reject it, in part or in toto. Such evidence, however, coming, as it does, from a polluted source, should be received with great caution and closely examined. It is proper for you to consider whether his testimony is prompted by a promise of leniency or a hope of reward, or as a means of obtaining revenge for a supposed injury. Yet, if, notwithstanding any of these

motives, you find there were such, you believe he speaks the truth, and such evidence is corroborated upon any material fact, you should find the defendant guilty.

"(4) You are instructed that the witness, Black, is in law what is known as an 'accomplice.' You are further instructed that an accomplice's testimony should be received with care and scrutiny, owing to the fact that where the State relies upon the testimony of an accomplice for conviction there is an implied agreement to extend immunity to such accomplice by reason of his giving testimony; yet you are instructed that if you believe beyond a reasonable doubt that the testimony given by the said Black is true, that you have a right, upon such evidence, to find the defendants, or either of them, guilty, whether the testimony of such accomplice be corroborated or not."

These were all the instructions given concerning the duty of the jury in acting upon the testimony of an accomplice.

The defendant requested the following which was refused: "The jury are instructed that in a prosecution for the larceny of an animal, being the fiddle-back steer involved in this trial, an accomplice's testimony is not corroborated as to defendant's connection with the crime by his having stated to officers the place near defendant's home or abode where the hide and brand were hidden; and the fact that such hide and brand were found as stated by the accomplice, Black, unless accompanied by other independent facts and circumstances in addition to the testimony of the accomplice, Black, is no corroboration of the accomplice's testimony."

Plaintiff in error, who, for the sake of convenience, is spoken of as the defendant, and his brother, James, were informed against and tried together, James being acquitted by the jury. Black testified that on January 8, 1900, he and defendant drove a steer of Mrs. Tillotson into the corral at the Merrill ranch, where they were employed; that both Lewis and James had their guns, and that James shot the steer first, but failed to kill it, and that Lewis then shot and killed it; that the meat was locked up in the granary, the brands cut out, and they and the hide buried and concealed. Black quit his employment and left the ranch about February 20th, some six weeks after the alleged larceny, and reported the circumstances to the prosecuting attorney. There is evidence that there was bad feeling between him

and the defendant, and that he threatened to get square. James Smith had been in the town of Douglas for two or three months staying at the hotel on account of a broken leg. He and the defendant and four other witnesses, who had no interest in the result of the trial so far as appears from the record, testify that he and defendant left the hotel in a buggy for the ranch, some 55 miles distant, on January 6th, two days prior to the alleged larceny. They all state that he had to be helped into the vehicle, and could not walk or stand without the use of two crutches. Another witness testifies that they stayed with him the night of the 6th at the Brown Spring ranch, and left for the Merrill ranch on the morning of the 7th; and he makes the same statement as the others as to the crippled condition of James. He also says that James was again at the Brown Spring ranch on the 13th, and that he had to help him in and out of the buggy. The prosecution fix the date of the alleged larceny with care, and with apparent certainty, by reference to a fact stated by Black that on that day the mail coach stopped at the ranch having a passenger named Richard Flynn. Both the proprietor of the mail line, who had entered Flynn's stage fare in his books, and Flynn himself, testify that that day was the 8th of January. In the light of the testimony of these five witnesses, therefore, as to the crippled condition of James Smith, it seems highly improbable that he could have taken the active part in the killing of the steer detailed by Black.

But it is a matter of yet more serious consideration that this evidence tends to prove that both Lewis and James Smith were absent from the ranch on the 4th, 5th, and 6th, and until late in the afternoon of the 7th, and that Black was in possession, either alone or in company with Harry Schwartz, who also about this time left the ranch in anger; or, as Black expressed it, "they had a kind of a row, and he quit them to come to town." Lewis testifies that, having returned to the ranch on the 7th, he left again on the morning of the 8th, and did not return until about noon of the 10th. That after his return he went to the granary, and, seeing the beef, said to Black, "Hello, you have got meat," and Black said, "Yes, he had killed a two year old." That naturally supposing it to be an animal belonging to Mrs. Merrill, he said no more about it. James says that as nearly as he can

remember the first time they had beef at a meal was the evening of the 8th.

Under the case made by the prosecution, therefore, fixing the date as the 8th of January, there is quite an array of evidence showing that for some four days prior both Lewis and James Smith were absent, and the ranch in possession of Black, either alone or in company with Schwartz. This afforded them ample opportunity to kill the animal, store the meat in the granary, and secrete the hide and brands without the knowledge of defendant or his brother, and six weeks afterwards, when ill feeling had arisen between them, to charge the crime to defendant and his brother, and at the same time have in hand full and minute information of the secreting of the hide and brands, and where they could be found, in order to establish the perpetration of the offense. Under these circumstances, it was necessary that the jury should be correctly and accurately informed as to the principles which should govern their consideration of this character of evidence. They were instructed that they had a right to find the defendants guilty upon the testimony of the accomplice, whether corroborated or not. No doubt a jury may convict upon the uncorroborated testimony of an accomplice, for the reason that there is no law of this State which forbids it, and the court would not be authorized by a peremptory instruction to direct an acquittal as in a case where no evidence was produced by the State connecting the defendant with the crime. But it is questionable if the jury have a "right" to find a defendant guilty of a felony upon such uncorroborated testimony, and the authorities are uniform that they ought not to do so. Greenleaf says: "Judges, in their discretion, will advise the jury not to convict of felony upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on the part of the judge. And, considering the respect always paid by the jury to this advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner in any case of felony upon the sole and uncorroborated testimony of an accomplice." Greenl. Ev. § 380. And many of the States have adopted statutes forbidding it.

It is not necessary in this case, however, to determine whether the omission to so advise the jury is reversible error; for the

court also charged the jury that if they believed the accomplice spoke the truth, and his evidence was corroborated upon any material fact, they should find the defendant guilty. This was a positive instruction that it was their duty to convict if there was corroboration upon any material fact, and it was the duty of the court to inform the jury what constituted such corroboration, certainly when a proper instruction upon that subject was requested by the defendant. This court in *McNeally v. State*, 5 Wyo. 69, 36 Pac. 824, in terms decided that the fact that the accomplice may have told the truth as to the location of the hide and brands of the animal feloniously killed, and conducted the officers to the spot where they were, did not inculcate the defendant, nor did the fact that they were found on his premises a short distance from his dwelling, and that these things were not a corroboration of the testimony of the accomplice. The principle is emphasized in this case where the evidence tends to show that both of the defendants were absent from the place for several days just prior to the alleged time of the killing of the animal, giving full opportunity to the accomplice and others to perpetrate the offense and conceal the evidences of it, without the knowledge or complicity of the defendants. The jury might well understand that these things were the corroboration which made it their duty to find the defendants guilty under the court's instructions, and we think the refusal to instruct them as requested was error, and clearly prejudicial to the defendants.

It is urged by the Attorney General that Black was not in contemplation of law an accomplice, as he testified that he was simply acting under the directions of Lewis Smith, as his employment required. But he made no claim that he was coerced or in fear. And, moreover, he was treated by the prosecution throughout the trial as an accomplice, was so declared to be by the court in its charge to the jury, and by his own admission, and, substantially, that of the prosecuting attorney, he was testifying under an immunity from prosecution. This gave the defendant the right to have his testimony treated as that of an accomplice in the charge of the court. *Com. v. Desmond*, 5 Gray, 80; *Barrara v. State*, 42 Tex. 260.

Some objection is made that the exceptions of the defendant relating to the giving or refusing of certain instructions were not preserved in the motion for a new trial so as to properly present

them to this court for review. But an examination of the record discloses that in the motion the giving of certain instructions over defendant's objection, and the refusal of others requested by him, are assigned as reasons why a new trial should be granted and an exception preserved to the overruling of the motion. This was sufficient. It was not necessary to incorporate into the motion a statement that these acts of the court were at the time excepted to. The bill of exceptions shows affirmatively that exceptions were at the time reserved to the giving of the instructions complained of by plaintiff in error.

The judgment will be reversed and the case remanded for a new trial.

POTTER C. J., and KNIGHT, J., concur.

STATE V. BLAIN ET AL.

118 Iowa 466—92 N. W. Rep. 650.

Decided December 17, 1902.

LARCENY: *Accomplice—Corroboration—Value of property—Newly discovered evidence—Severe punishment.*

1. Evidence stated in opinion held to be sufficient corroboration of the testimony of an accomplice.
2. Where State's witness placed the value of a stolen saddle at \$25 to \$45, and defendant's witness, at from \$10 to \$18, the jury was warranted in assessing the value at \$25.
3. The discovery of witnesses who would place the value of the saddle below \$20, not ground for new trial.
4. The punishment imposed is within the statutory limit, and no cause appears why the discretion of the trial judge should be disturbed.

Appeal from District Court, Polk County; Hon. S. F. Prouty, Judge.

The defendant, jointly indicted with several other persons for the alleged larceny of a saddle, was separately tried and convicted. A motion in arrest of judgment and for a new trial was overruled. From the judgment entered on the verdict he appeals. Affirmed.

H. W. Laton and Wambach & Jordan, for the appellant.

Chas. W. Mullan, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

WEAVER, J. 1. It is first urged that the evidence is insufficient to sustain a verdict of guilty, and especially that the testimony of Pearl Murray, a codefendant and accomplice, is without corroboration. This contention is not well founded. In addition to the direct and unqualified statements of the accomplice, pointing out the defendant as one of the guilty parties, it is shown by other witnesses that he was in the immediate vicinity of the place where the property was stolen, at or about the time when the theft was committed; that he was then in the company of his codefendants, among whom was one Miller, in whose possession the saddle was afterwards found; and that just before the commission of the alleged offense he was heard to say that he "had the saddle spotted." These things, we think, afford ample corroboration to justify the court in submitting the question of defendant's guilt to the jury; and it cannot be said that the verdict is without sufficient support.

2. It is further objected that the verdict of the jury in assessing the value of the stolen property at \$25 is against the weight of the evidence. Several witnesses produced by the State estimated the value at from \$25 to \$45, while the witnesses on part of the defendant placed the figure at from \$10 to \$18. It needs no more than this statement to show that the verdict of the jury was by no means extravagant or excessive, and is amply sustained by the record.

3. In support of the motion for new trial, appellant's counsel filed an affidavit alleging that since the verdict of the jury he had discovered additional witnesses who would place the value of the saddle below \$20. This testimony, if produced, would have been merely cumulative upon a point to which appellant examined several witnesses, and the affidavit was insufficient to justify the District Court in awarding a new trial.

4. Finally, it is objected that the punishment imposed is excessive. It is within the limit prescribed by the statute, and we find nothing in the record which calls for our interference with the discretion of the District Court. The judgment appealed from is affirmed.

HERNANDEZ v. STATE.

43 Texas Crim. Rep. 80—63 S. W. Rep. 320.

Decided May 22, 1901.

LARCENY: Uncertainty in belief of witness—Variance.

1. Prosecuting witness, Henar, entered a place where several strangers were engaged in playing poker, appellant dealing the cards. Henar was invited to and did join in the playing; won some money, appellant dealing several times. Then, accused dealing the cards, Henar received four aces, when accused ceased to be dealer, another taking his place. In the betting Henar placed \$45.00 on the table, and a friend, Francis, glancing at his hand, offered to back him and placed \$78.00 on the table. One player then placed four kings on the table, when Henar said he had four aces, but not showing them, a foul was called, his cards seized and cast down as six cards, and in the turmoil one or more of the players quickly grabbed for the money, Henar failing to get any. The witnesses, except Henar, testified that they did not see accused at the time of the money grabbing; Henar testified that he thought he was present, and took part in it.
Held, there being no evidence of accused being in a conspiracy, the charge of larceny was not proved, also that Henar stating that he believed the accused was present, was not proof of a fact beyond a reasonable doubt.
2. The indictment charged the money to belong to Henar and Francis; but the proof was that Henar had \$45.00 and Francis advanced him \$78.00, hence, a variance.

Appeal from District Court, Bexar County; Hon. John H. Clark, Judge.

Martin Hernandez, convicted of theft, appeals. Reversed.

Edward Dwyer and *Frank Cresswell*, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of the theft of money, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

The indictment is in the ordinary form for theft, and charges that the money was the property of W. B. Henar and W. A. Francis, and was taken from their possession. The testimony shows that Henar, on the occasion in question, engaged in a game of poker at the Washington Theatre, in San Antonio, with certain persons, who were strangers to him. It seems that these parties were all engaged in the game when he entered the place.

Their names were Anderson, Blalock, Ponds, and a one-legged man, whose name is not disclosed. Appellant, Hernandez, was dealing the cards. On invitation prosecutor joined the game. Hernandez dealt several hands around, and prosecutor, Henar, won some five dollars. At this juncture Hernandez dealt the cards, giving prosecutor, Henar, four aces and the one-legged man four kings. He then absented himself, and Blalock took his place as dealer. The parties bet around, and, it seems, all "passed out" except Henar and the one-legged man. Several "raises" were made, and prosecutor had put \$45 on the table. About this juncture two of his friends, who were in the city,—Francis and Richards,—came in. Francis stood behind Henar, looked at his hand, and told him he would back that hand for any amount, and pulled out \$78, and placed it on the table, which was necessary to meet a raise that had been made by the one-legged man. The one-legged man showed his hand, which contained four kings. Henar stated he had four aces. Some one told him to put his hand down on the table, but he declined. Anderson came up behind him, grabbed his cards out of his hand, saying, "You have got a foul; you have six cards," putting them on the table, and there were six cards. Prosecutor testified, and so did Francis, that he had five cards until Anderson grabbed his hand. So the theory of the State was that Anderson must have placed the other card with the hand when he grabbed it. As soon as this was done, the one-legged man declared that no man could take his money on a foul, and Anderson and the one-legged man, and perhaps others, grabbed for the money. Prosecutor also grabbed, but did not get any. Prosecutor testified that defendant, Hernandez, was present, and joined in the grabbing, he thought, but was not certain. All of the other witnesses testified that they did not see Hernandez present, nor did they see him grab for the money. The theory of the State evidently is that the game of cards was a mere trick or pretense; that there was a conspiracy between the parties to rob or steal from prosecutor, Henar, and that Hernandez was one of the conspirators; that he accordingly dealt out the cards, giving four aces to prosecutor and four kings to the one-legged man; and that subsequently, as a part of the plot or conspiracy, Anderson grabbed prosecutor's hand, and slipped another card therein, making a foul, in order to gain a pretext for taking the money. If the proof established this

beyond a reasonable doubt, we are inclined to the opinion that a theft could be committed in this manner. The prosecutor had not parted with the title to the property when he placed his money in the "pot." He had merely parted with the temporary possession, undertaking to win the "pot" fairly in accordance with the rules of the game. Now if, under these circumstances, some trick was played, and a foul declared, and appellant was a party thereto, and engaged in taking the money, he might be guilty of theft. However, it is not necessary to decide this question, because, as we view the evidence, the testimony wholly fails to connect appellant with any conspiracy. For aught that appears, he dealt the cards fairly, and gave prosecutor the best hand, and he was entitled to win the money under the rules of the game. No connection is shown between appellant and Anderson in grabbing prosecutor's cards, and making a foul out of his hand. No witness places him present at that time; nor does any witness testify that he was present and participated in grabbing the stakes off the table. The most that can be said in this regard is the prosecutor's own testimony, in which he declares that he thinks appellant was present, and grabbed for the money. Now, what a witness thinks or believes ought not to be held to establish a proposition beyond a reasonable doubt; and the requirement of the law is that an issue of this character should be established beyond a reasonable doubt. The testimony of the prosecutor, giving it full stress, only raises a suspicion that appellant was present. This, however, was not sufficient to authorize a conviction. *Tollett v. State*, 44 Tex. 95.

There is also another proposition that we think is fatal to this conviction. Under the evidence we do not think that the money was the joint property of Henar and Francis. If—and the testimony seems to indicate this—Francis loaned \$78 to Henar, all of the money was Henar's. Evidently it had been placed in his possession by Francis. If this theory be not correct, then \$78 was the property of Francis and \$45 was the property of Henar. They were not joint owners of the fund, but separate owners of their distinctive shares. The indictment alleges the money as the property of the two. We do not think the proof sustains this.

The judgment is reversed, and the cause remanded.

COLLINS V. STATE.

115 Wis. 596—92 N. W. Rep. 266.

Decided November 11, 1902.

LARCENY—INTOXICATION—CONFESSIONS: *Necessity to clearly instruct the jury that intoxication of accused should be considered in passing upon the question of specific intent—Confessions of two defendants and their bearing—Limiting the confession of one as evidence against herself alone—Bernhardt v. State., distinguished if not overruled.*

1. While intoxication is no defense to a crime actually committed, yet where a specific intent is a necessary element in a crime, the question on intoxication may become important, in determining whether the person charged was in a state of mind capable of forming such specific intent; and upon this accused is entitled to the benefit of a reasonable doubt as to such specific intent.
2. It is error to refuse an instruction clearly embodying the doctrine stated in last paragraph; unless the same is otherwise properly and adequately covered by the charge. The charge of the court in this regard, held insufficient and misleading; and *Bernhardt v. State*, 82 Wis. 23, apparently supporting it, distinguished, if not in fact overruled.
3. Evidence that one of the accused offered to return the money taken, stating that it was only a joke, and that he was tired of the matter, was properly admitted, as an admission of the fact; the weight of the evidence being for the jury.
4. An admission made by one of the accused, was admissible in evidence; the court having limited its effects to her alone.

Error to Municipal Court, Milwaukee County; Hon. A. C. Braze, Judge.

Stephens Collins, convicted of larceny, brings error. Reversed.

The plaintiff in error, Pauline Palmer and Marie Gordon, were jointly indicted and tried for, and the two former convicted of larceny from the person of Charles Love. On January 29, 1902, all four were carousing together in a saloon in Milwaukee; and, it was substantially claimed, that Love, either by accident or through interference by Collins, fell to the floor, and, that while Collins pretended to assist him to arise, there was taken from him a pocketbook, containing considerable money and several rings; that Collins retained the money and the two rings were divided between the two women. All three of the accused made statements to the chief of the police, admitting certain of the facts narrated by Love; but denying complicity in the crime.

A. C. Umbreit, for the plaintiff in error.

E. R. Hicks, Attorney General, Edward T. Fairchild, Assistant Attorney General, R. F. Hamilton, Second Assistant Attorney General, and W. H. Bennett, District Attorney, for the State.

DODGE, J. The first assignment of error is predicated upon the admission of the testimony of a police officer that, some time after the preliminary examination, Collins, being on bail, came to him and expressed a desire to have the prosecution settled, saying: "I will give this man his money back. I am getting tired of this. It was a joke, and you can settle it,"—and other remarks of the same tendency. Upon motion to strike out this testimony, the court, overruling it, said: "The jury will remember the former instruction, and consider the testimony of any one of the defendants given in the absence of the others is only to be considered as touching the guilt or innocence of the person so making the statement." We can discover no merit in this assignment of error. Courts have uniformly held that an offer to settle a criminal prosecution is admissible in evidence, and this holding can be based only upon the foundation that there is a possible inference of guilt to be drawn therefrom, and that the jury are the proper forum, after the transaction is laid before them in evidence, to decide whether any such inference shall be drawn. *State v. Rodrigues*, 45 La. Ann. 1040, 13 South. 802; *Barr v. People*, 113 Ill. 471; *McMath v. State*, 55 Ga. 303; *State v. De Berry*, 92 N. C. 800. The language in the present instance was certainly capable of supporting such an inference. The offer to give the money back, and the statement that the transaction had been a joke, might carry the implication that the money had in fact been taken from the complaining witness.

1. But the attorney for the plaintiff in error especially complains of the ruling above quoted, apparently, as if the court therein had characterized the statements testified to as a confession or an admission of guilt. Such improper characterization of statements made by an accused was discussed in *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170. In the ruling of the court now under consideration, however, nothing of the sort appears. He simply reiterated the caution that any testimony given (presumably meaning statements made) by one of the accused in the absence of the others could not be considered against such others. He

did not characterize the testimony or the statements as either confession or admission. We fail to see how he could have more carefully guarded the accused from any intimation of his own opinion as to the effect or significance of the transaction given in evidence.

2. The statement made by the codefendant Marie Gordon, and taken by a stenographer, was offered in evidence, and received by the court under the instruction that the jury must not consider it as bearing upon the guilt or innocence of either of the other defendants. It is said that the statement was entirely exculpatory as to Marie Gordon, and consisted wholly of incrimination of the other two defendants; therefore it could have no admissibility as to her, and its only purpose must have been to improperly affect the jury in considering the guilt or innocence of her codefendants. We appreciate the peril to a defendant, tried jointly with others, from statements made out of court and out of his presence by the other accused, but upon joint trials there is no complete escape from this practical peril. Such statements, when voluntary and containing any element of admission, must be received as against the defendant making them, and the utmost protection which the courts or the law can give to the codefendant consists in the direction to the jury not to consider such statements as to him. That direction was carefully given in this case, and the reception of the Gordon woman's statement was one of the incidents of a joint trial. It is not true, as counsel contend, that it contained no element of admission on her part. It did admit her presence at the time of the alleged larceny, her participation in the joint orgy then in progress, and the fact that she received and had in her possession certain of the stolen property. We think the statement was properly admissible as to her, and that the court rightly took the only step in his power to render it nonperjudicial to the plaintiff in error, and that no error was committed, as against him, in its admission.

3. Error is assigned upon the admission in evidence of a stenographer's testimony as to a statement made by the plaintiff in error himself to the chief of police in response to interrogatories by the latter, in the course of which interrogatories there was stated to him the general substance of declarations that had already been made by the two women. Were the statements objected to as not having been voluntarily made by the

plaintiff in error, but as the result of at least implied coercion, threat, or promise, its similarity to that held inadmissible in the recent case of *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568 (10 Amer. Crim. Rep. 547), would demand careful consideration; but an examination of the record discloses that such objection was not made. When the statement was offered, defendant's counsel objected "for the reason that it contains statements made by one of the other codefendants, which statement has not as yet been properly proven as having been voluntary and free; but as to the rest of it there is no objection." Thus the objection to the reception of his statement or declaration on the ground that it was not voluntarily made by Collins was expressly disclaimed. The objection in fact urged to it, that, in the conversation about to be given, the chief of police had quoted to Collins statements of the other defendants, without showing that such statements had been voluntarily made to him, could not of itself render his statement inadmissible. If the accused had consented that the conversation between him and the chief of police might be given at all, the whole thereof was admissible, —indeed, was necessary, in order to make his own answers intelligible; and it was wholly immaterial whether the statements from others quoted by the chief of police had been made voluntarily or involuntarily. They were parts of the conversation with this defendant, and were equally the basis of Collins' replies. This error, also, must be overruled.

4. The plaintiff in error assigns error upon the instruction of the court with reference to intoxication as bearing upon the criminal intent. His counsel requested (and to the refusal thereof excepted) an instruction in the following words: "The intent just referred to and explained can exist only when the party is competent to form an intent, and purposely takes the property alleged to have been stolen. Testimony has been received in this case tending to show that these defendants were intoxicated at the time of the alleged larceny. While mere intoxication is not an excuse for crime, nor a defense to a criminal charge, yet when a specific intent is necessary, as in the case of larceny, the question of intoxication becomes important, in determining whether the person charged was or was not in such a state of mind as to be able to form such specific intent. As already explained, the mere taking of property of another does not constitute larceny,

unless the intent permanently to deprive the owner thereof existed at the time of the taking. You may therefore consider whether or not the defendants, or either of them, were so intoxicated at the time of the alleged larceny as to be incapable of forming the felonious intent which is a necessary element of the crime. If you find that they were, or if you have a reasonable doubt as to whether they were or not, then they are not guilty of the charge, and must be acquitted." The court gave the following instruction on that subject: "It is claimed on the part of the defense, and there has been some testimony offered tending to show, that the defendants at the time and place charged were intoxicated, and on this question of intoxication you are instructed that voluntary intoxication is no defense to a crime actually committed; that is, one cannot of his own free will become intoxicated, and successfully plead intoxication in court as a defense to a crime committed when in that condition. But in case where the intent forms a portion of the offense necessary to be found for the jury, intoxication may be taken into consideration by the jury. 'If you should find from the evidence and circumstances surrounding the alleged commission of the offense that the defendants, or either of them, at the time and place charged, were in such a condition, from the use of spirituous liquors, that they, or either of them, were incapable of forming an intent to deprive the complaining witness, Love, of his property, and of his ownership of the same, then you may consider the question of intoxication. The question simply is, were the defendants, or either of them, at the time,—before you consider the question of intoxication at all,—were they, or either of them, at the time in such a condition mentally as to be incapable of forming the intent feloniously to deprive the complaining witness, Love, of his property, and his ownership of the same. But, gentlemen, you will remember that every person who is sober enough to plan and execute a crime is, in law, sober enough to be responsible for his acts.'" The instruction requested is an accurate and clear statement of the law upon the subject, and should have been given. Its refusal is error, unless the subject is properly and adequately covered by the charge as in fact given. An examination of that charge, however, discloses that it wholly failed to inform the jury of the effect upon their verdict of a finding of such degree of intoxication as to render the accused incapable

of a criminal intent. If they found such degree of intoxication, or, indeed, if the evidence raised a reasonable doubt whether it did not exist, their duty was to acquit, and the court was requested to so instruct. That he did not do. It will be noticed that his only instruction to the jury is that, if they find there was a condition such as to render him incapable of forming the criminal intent, then they "may consider the question of intoxication." This is not enough. It did not give to the accused the benefit of the true rule of law on the subject. We are aware that the instruction given in this case on the subject of intoxication is substantially identical with that considered in *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009, as appears from the briefs filed in that case, though not fully in the opinion, and that it was there said to be accurate. We think the remark unfortunate, as applied to the whole instruction, which is very confusing; apparently directing the jury that they must find mental incapacity from intoxication before they can consider at all whether intoxication existed. The particular defect which we now point out, however, was not there urged, and the omission was not emphasized by a correct and accurate request for instruction that acquittal must follow the incapacity to entertain criminal intent. In the *Bernhardt Case* the matter under discussion was rather the definition of the degree and mental effect of the intoxication, and in that respect, doubtless, the instruction given by the court was more nearly accurate than that requested by the counsel. We cannot avoid the conclusion that in the instant case error was committed, prejudicial to the plaintiff in error, in failing to embody, when requested, the clear and definite direction to acquit in case the jury found incapacity to form the criminal intent by reason of intoxication, or entertained reasonable doubt of the existence of such incapacity.

By the Court.—Judgment reversed, and cause remanded for a new trial. The warden of the State prison will deliver the plaintiff in error, Stephen Collins, to the sheriff of Milwaukee County, who is directed to keep the said Collins in his custody until he is duly discharged therefrom or until otherwise ordered according to law.

PERRY V. STATE.

42 Texas Crim. Rep. 540—61 S. W. Rep. 400.

Decided March 6, 1901.

LARCENY—VARIANCE—CONFESSIONS: *Misdescription of silver certificates as money of the United States—Insufficient warning to a boy preceding a confession—Hearsay testimony.*

1. An information describing alleged stolen property as "twenty-nine dollars, same being lawful money of the United States of America of the value of twenty-nine dollars," cannot be sustained by proof of a larceny of silver certificates.
2. A warning preceding a confession: that it "could be used against him or for him," is not a compliance with statutes of Texas.
3. A warning given to a mere boy, on the day previous to the confession, should be repeated, so as to put him on his guard at the time of the confession.

Appeal from Navarro County Court; Hon. J. F. Stout, Judge. Ben Perry, convicted of theft, appeals. Reversed.

Ballew & Ballew, for the appellant.

D. E. Simmons, Acting Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of theft of money under the value of \$50, and his punishment assessed at imprisonment in the county jail for 60 days; and he prosecutes this appeal.

Appellant assigns as error a variance between the proof and the allegations as to the description of the money in the information. The information describes the property as "twenty-nine dollars, same being lawful money of the United States of America of the value of twenty-nine dollars." The proof showed four five-dollar bills, silver certificates or national bank notes, and seven one-dollar bills, silver certificates, and one two-dollar bill, also described by the witness as a silver certificate. It has been held in a number of decisions that the allegation "lawful money of the United States" means coin or treasury notes made a legal tender by act of congress. We are not advised of any case holding that under our statute with reference to theft of money national bank bills or silver certificates are regarded as money. See *Otero v. State*, 30 Tex. App. 450, 17 S. W. 1081; *Mcneer v. State*, Id. 475. 17 S. W. 1082; *Dukes v. State*, 22 Tex. App. 192, 2 S. W. 590; *Thompson v. State*, 35 Tex. Cr.

App. 511, 34 S. W. 629; *Warren v. State*, 29 Tex. 369; *Wofford v. State*, 29 Tex. App. 536, 16 S. W. 535. In our opinion, there was a variance between the allegations in the information and the proof offered. It occurs to us it would have been a very easy matter for the pleader, in drawing the information, to have described the money more fully. The character of bills could have been set forth, and the number and denominations of same. When this is practicable, it should always be done; and, when not, there should be an allegation in the information giving an excuse for the want of this particularity of allegation.

Appellant objected to his alleged confession introduced in evidence by the State through the witness, Martin Clark, on the ground that he had not been warned by Clark. However, the bill shows that he had been warned by the city marshal, Cole, on the day previous. The warning, though, was not in accordance with the statute. He was told by the officer that anything he stated "could be used against him or for him." In *Barth v. State*, 39 Tex. Cr. R. 381, 46 S. W. 228, it was held that the confession need not be made to the party giving the warning, but it must be within such reasonable time thereafter as to indicate defendant remembered and was impressed with the warning given, and made the confession under it, comprehending its legal effect, to wit, that it could be used against him. The warning given here was sufficiently near in point of time, but, appellant being a mere boy, it occurs to us the warning should have been repeated, so as to have put him on guard with reference to his rights. More than this, the warning was not in accordance with the law. *Guinn v. State*, 39 Tex. Cr. R. 257, 45 S. W. 694; *Unsell v. State*, 39 Tex. Cr. R. 330, 45 S. W. 1022.

We also think the testimony given by Clark as to what Claud Maddox told him was clearly hearsay. It is not necessary to notice other assignments. The judgment is reversed, and the cause remanded.

BROOKS, J. I think the information is correct, and there is no variance.

BISHOP ET AL. V. PEOPLE.

194 Ill. 365—62 N. E. Rep. 785.

Decided February 21, 1902.

LARCENY—PROOF OF OTHER CRIME—STATUTE OF LIMITATIONS: *Proof of other distinct crimes not admissible—Identity of stolen property should be beyond all reasonable doubt—Statute of limitations applies to misdemeanors included in felony charge.*

1. In a criminal case evidence tending to prove a similar but distinct offense from that for which the accused is being tried is not admissible for the purpose of raising an inference that he committed the crime of which he is accused.
2. On the trial of one charged with having stolen copper wire, which he had sold to a junk dealer, from an electric light house, the State must prove beyond a reasonable doubt, the identity of the wire as coming from the electric light house.
3. One indicted for grand larceny and charged with having stolen and sold again some copper wire in the condition it then was, was worth more than \$15 in cash, and that if they fail to make such proof and the jury believe from the evidence that the wire was stolen more than eighteen months before the indictment was found, the accused should be acquitted.

Error to Circuit Court, McLean County; Hon. Colostin D. Myers, Judge.

S. Dixon Bishop and another, convicted of grand larceny, bring error. Reversed.

Tipton & Tipton and *S. H. Hayes*, for the plaintiffs in error.
H. J. Hamlin, Attorney General, *R. L. Fleming*, State's Attorney, and *E. M. Hoblit* of counsel, for the People.

WILKIN, C. J. This is a writ of error to the McLean Circuit Court, seeking to reverse a judgment rendered there convicting the plaintiffs in error of the crime of grand larceny. They were found guilty upon an indictment charging them, jointly with one Frank Lott, of stealing 200 pounds of copper wire, of the value of 15 cents per pound, belonging to Henry Keiser. Frank Lott was granted a separate trial.

It appears from the evidence that prior to January, 1900, several rolls of old copper wire had been taken from poles by Henry Keiser, owner of the electric light plant at Heyworth, in McLean County, and placed in a coal shed connected with the plant. W. R. Johnson, the superintendent, testified that some of the rolls

were taken away during the months of January and February, but he does not undertake to state how many were taken. Indeed, he does not state how many rolls were placed in the coal house, but says, "I presume, five or six." About the last of January, 1900, the defendants took to the place of Frank Lott, a junk dealer in Heyworth, a quantity of wire, loaded on a wheelbarrow, and received from him for it a check for \$13.30. The theory of the prosecution is that this was a part of the wire belonging to Keiser. The defendants did not deny the delivery of the wire to Lott, but claimed that it was done for and at the request of Lott. They both testified, in substance, that he told them he had some stuff on a wheelbarrow back of a certain store, and wanted them to convey it to his place; that they went to the place indicated, and found a wheelbarrow with something on it, covered with a piece of carpet or sack; and that as they proceeded to Lott's place the covering slipped off, and they discovered it to be wire. But they gave no description of it, and were not asked to do so. They further testify that when they delivered it to Lott he gave them a check, as they supposed, to pay for conveying it there, but which proved to be for \$13.30; that one of them the next day cashed the check, and they divided the money, but, discovering that they were accused of the larceny, they offered to return the money to Lott, and, he refusing to receive it, they sent it to Keiser. They both denied all knowledge of the larceny.

While it is impossible to reconcile the defendants' conduct with their innocence, the proof upon which the prosecution relied to make out the case is very unsatisfactory, in that it fails to identify the wire delivered by them to Lott as that taken from the plant of Henry Keiser with the degree of certainty required in criminal cases. There is an entire absence of testimony as to the description of the wire delivered to Lott. Whether it was in a roll, in long or short pieces; whether it was new, insulated, fit for use in an electric light plant, or merely scrap wire,—in no way appears. There is evidence to the effect that the defendants admitted they took certain wire to Lott and sold it, but those admissions were accompanied with the declaration that they did not take it from the plant, but found it upon the wheelbarrow, as they testified, and there is no direct evidence that they did take it from the plant. The stepson of Lott testified that when they

brought it to the house it was in a sack, and his stepfather told them junk wire was worth six cents a pound.

But conceding that the evidence of the theft, as alleged in the indictment, was sufficient to justify the conviction, there was manifest error in the ruling of the trial court on the admission of testimony. One Frank Miller was sworn on behalf of the prosecution, and, over the objection of the defendants, allowed to testify to a conversation with the defendants in regard to a roll of wire which it is not claimed had anything to do with the alleged crime. He testified: "I had a conversation with Young, along in January or February, regarding the sale of some wire." The conversation was objected to by counsel for the defendants, unless confined to the roll of wire in question, but the court overruled the objection; and the defendants, by their counsel, duly excepted. Thereupon the witness proceeded: "He asked me if I would help him steal a roll of wire out of the electric light plant at Heyworth—copper wire. This was in the afternoon. We were sawing ice together. He told me how much easier and faster a way of making money it was than sawing ice. That evening, after supper, he came to me and asked me again to help him steal the wire. I told him I wouldn't do it. He said: 'I will ask you to help wheel it down to Frank Lott's. We have it on the wheelbarrow, but Bishop is not stout enough to wheel it down there.' " The defendants objected, and asked to have the answer excluded, but the request was again denied; and the witness further stated: "He said: 'All I ask you is to help us wheel it down to Lott's. Bishop isn't stout enough. If you help, don't say anything to Lott, because if he finds out we stole this wire he will not buy it.' He said: 'I and Bishop sold him a bunch of wire a month or so before that.' He said: 'If Lott will buy it, and we get the money, I will divide the money between you and Bishop and myself.' He said: 'We don't care who Lott states he got the wire from. We can out-swear him; and, if he will not buy it, there is a man in Bloomington will.' Right after a while I had a talk with Bishop—about two or three weeks, maybe. He saw Young and I talking one day, and he asked me if Young was asking me to help him steal something. I said, 'Yes.' He said, 'That is what I told him.' I said, 'Did you help Young with one bunch of wire?' and he said, 'Yes.' that they took one bunch to Lott's and sold it to him, but Young got him into that, and

he will never help him do anything else. Bishop told me he didn't know anything about this big roll of wire. I did not tell him where this big roll of wire was at the time. He said he sold the first bunch to Lott, and he gave them a check for thirteen dollars and something. The wire weighed about one hundred and eighty-five pounds." The conversation was denied by both the defendants.

This testimony, under a well-recognized rule of evidence, was wholly incompetent, and the only effect of it must have been to prejudice the jury against the defendants in the case upon trial by showing they were willing to commit another and different crime. Whart. Cr. Law, § 635; *Baker v. People*, 105 Ill. 452; *Farris v. Same*, 129 Ill. 521, 21 N. E. 821, 4 L. R. A. 582, 16 Am. St. Rep. 283; *Parkinson v. Same*, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91; *Janzen v. Same*, 159 Ill. 440, 42 N. E. 862. In the latter case, after quoting from Wharton, where he says, "It is under no circumstances admissible for the prosecutor to put in evidence the defendant's general bad character, or his tendency to commit the particular offense charged; nor is it admissible to prove independent crimes, even though of the same general character, except when falling strictly within the exceptions above stated"—we said: "The exceptions alluded to by the author would not embrace the evidence under consideration. In *Parkinson v. People*, 135 Ill. 401, 25 N. E. 764, 10 L. R. A. 91, a similar question arose; and it was held that evidence tending to prove a similar but distinct offense from that for which one is being tried is not admissible for the purpose of raising an inference or presumption that the prisoner committed the particular act for which he is on trial." See, also, *Turley v. Same*, 188 Ill. 628, 59 N. E. 506. It is not claimed, and could not be, that the foregoing evidence falls within any exception to the general rule as above stated.

We also think the court erred in the refusal of instructions asked on behalf of the defendants. Their counsel submitted to the court an instruction as follows:

"The court instructs the jury that one of the material questions in this case is whether or not the wire in question is the identical wire taken from the electric light house, and the burden of proof is on the prosecution to prove beyond a reasonable doubt the identity of the wire as coming from the electric light house."

This instruction was refused. We are unable to discover any objection to that instruction, and it was clearly applicable to the case. The only justification for its refusal would be that it was covered by others given, and this we do not find to be true. As is too often the case, this record is burdened with instructions asked by both sides, and entirely too many were given. About 20 of those asked by the defendants were refused,—most of them properly; but we think in refusing this one there was manifest error.

After the trial and conviction of plaintiffs in error, Frank Lott was tried for the same crime and acquitted; it being shown upon his trial that the wire delivered to him by the defendants, Bishop and Young, was of much less value than \$15, making the crime, at most, but petit larceny, which was barred by limitation. Thereupon the defendants set up in their motion for new trial that testimony as newly-discovered evidence, and sought to show that they had used proper diligence to obtain the same prior to the trial. While we think they did not bring themselves within the rule requiring diligence on their part and that of their attorneys to discover and produce the newly-discovered testimony on the trial, the evidence set up in the motion very clearly, if not conclusively, shows that the crime, if committed, was petit, and not grand, larceny; and, if the former, it is conceded that no conviction could be had, more than one year and six months having elapsed between the commission of the alleged larceny and the finding of the indictment.

As we understand the evidence, it wholly failed to prove that the value of the property exceeded \$15, but the court gave, at the instance of the plaintiff, an instruction which directed the jury "that if you believe from the evidence, beyond a reasonable doubt, that the defendants are guilty of larceny, in manner and form as charged in the indictment, and that the value of the property stolen was more than \$15, then, if you further believe from the evidence, beyond a reasonable doubt, that such crime was committed by the defendants within three years last past, you should find them guilty, although the date when such larceny was committed was different from the date alleged in the indictment." Waiving the question as to whether there was any evidence upon which to base this instruction, the defendant certainly had a right to have the jury instructed as to their duty in

case they found the value of the property to be \$15 or less, and they asked the court to give instruction No. 20, as follows:

"The court instructs the jury that, although they may believe from the evidence that the wire in question was stolen by some party or parties, the burden of proof is on the prosecution to prove beyond a reasonable doubt that the wire, in the condition it then was, was worth more than \$15 in cash; and if they fail to make such proof, and the jury further believes from the evidence that said wire was stolen more than eighteen months prior to the finding and presentation of the indictment in this court, then the jury will acquit the defendants." While it may be conceded that this instruction is not skillfully drawn, yet we think it should have been given, and especially so in view of the fact that the court had given the instruction above set out on behalf of the People.

The record in this case is very much confused, but we are convinced that the trial court was in error in the admission of testimony, as above stated, and in the refusal of the foregoing instructions, and for those reasons, without reference to the many other errors insisted upon, its judgment must be reversed, and the cause remanded. Reversed and remanded.

STATE V. LEWIS.

133 N. C. 653—45 S. E. Rep. 521.

Decided October 6, 1903.

LARCENY: Error in excluding testimony as to prosecutor's habits.

The prosecuting witness in a state of intoxication, requested the defendant to take from his pocket money to pay for drinks, which was done, and the money bag returned to the pocket. The prosecuting witness claimed, that later the defendant took his money. As incriminating evidence, it was shown that the defendant, at the time he returned the money, called the attention of the bar-tender to that fact. The defendant offered to prove that the prosecuting witness was in the habit of losing money, when intoxicated and charging others with stealing it, which offer was rejected. *Held*, that this rejection was error.

Appeal from Superior Court, Lenoir County; Hon. R. B. Peebles, Judge.

Thomas Lewis, convicted of larceny, appeals. Reversed.

*Swift Galloway and Land & Cowper, for the appellant.
Robert T. Gilmer, Attorney General, for the State..*

CONNOR, J. The defendant was tried upon an indictment for the larceny of money from the person of John Grant. It was in evidence on the part of the State that the prosecutor sold tobacco in Kinston, and in company with defendant, who had brought tobacco for him to market, got the money at the bank for a check received in payment of his tobacco; that prosecutor and defendant went to a barroom, and took a drink, and bought a jug of whisky. At request of prosecutor defendant put his hand in prosecutor's pocket and got the money, which was in a tobacco bag, paid for the liquor, and put the money back into prosecutor's pocket, calling the attention of the clerk to the fact that he had replaced the bag containing the money. Prosecutor swore that after this he, with the defendant, went back to the warehouse, where prosecutor laid down and went to sleep; that defendant put his hand in his (prosecutor's) pocket, and took the money out; that he said, "Tom, don't take my money." Defendant said nothing, but took the money. On cross-examination defendant asked prosecutor if he had not been in the habit of losing money when drunk and accusing other people of stealing it, to which the witness answered "no." The defendant proposed to show by a witness introduced by himself and by his own testimony that on a great many occasions the prosecutor had wrongfully accused people of stealing his money while he was drunk; that he was in the habit of getting drunk and losing money, and accusing people of stealing same, and that defendant had heard and knew of this habit. The proposed testimony was, upon the objection of the State, excluded, to which the defendant excepted. It seems that his Honor was of the opinion that the question asked the prosecutor was collateral to the issue, and that, not coming within any of the exceptions to the general rule, the defendant was bound by the answer of the witness. *State v. Patterson*, 24 N. C. 346, 38 Am. Dec. 699.

We are of the opinion that the testimony proposed to be elicited was competent. The prosecutor has sworn that he had been drinking, and was asleep when the money was taken. The defendant's plea of not guilty involved a denial that he had taken the money.

The defendant's counsel, in their well-considered brief and oral argument, contend that the testimony is competent in another point of view. It was shown by the State that when the prosecutor and the defendant were in the barroom, the defendant, at the request of the prosecutor, took the money from his pocket, and paid for the liquor; that when he replaced the bag containing the prosecutor's money in his (prosecutor's) pocket the defendant called the attention of the clerk to this fact. This testimony was introduced as the basis for the argument that the defendant was preparing to take the prosecutor's money; that he was seeking to disarm suspicion by calling the attention of Odom, the clerk in the bar, to the fact that he had replaced the bag of money in the prosecutor's pocket. This conduct on the part of the defendant was clearly competent and properly admitted for this purpose. For the purpose of explaining this conduct and repelling the contention of the State, he should have been permitted to show the habit of the prosecutor respecting the loss of his money, and his knowledge of such habit. It is a matter of common observation and experience that men are more cautious and careful in dealing with the money or property of persons who are in the habit of drinking to excess, or who are illiterate, or who are known to be suspicious of persons with whom they have dealings. This is a matter of common prudence. It would be a hard measure if one taking the precaution to protect himself against an unfounded charge of dishonesty should have his conduct converted into an argument tending to show a preconceived guilty purpose, and not be permitted to explain the reasons which prompted his conduct. We can well understand how the Solicitor could use with telling effect the conduct of the defendant in this respect, and, without explanation, it would weigh heavily in the scale against the defendant. When it was admitted, the explanation should also have been admitted to the end that the jury should be able to properly estimate its value in arriving at a verdict. His Honor was in error in excluding it. We do not deem it necessary to pass upon the exceptions to his Honor's charge.

The defendant is entitled to a new trial.

REED V. STATE.

66 Neb. 184—92 N. W. Rep. 321.

Decided November 6, 1902.

LARCENY—PRACTICE: *Review of the evidence—Waiver of error—Inaccurate instruction withdrawn and replaced by a proper one—Cross-examination—Misconduct of counsel—Effervescent invocation in closing argument of the prosecuting attorney—Courts take judicial cognizance of the value of money—Records of conviction as impeaching testimony—Instructions—Minor questions of practice.*

1. The objection that the issue in a criminal case was not formally made up before trial must be first raised in the District Court.
2. Rulings of the trial court not alleged as error in the petition in error will not be reviewed.
3. A motion for a new trial is properly dealt with as an entirety. If it cannot be sustained in the form in which it is presented, it is not error to overrule it.
4. It is not error for the court in a criminal case to say to the jury as part of its charge: "You are not at liberty to disbelieve as jurors, if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered." (*Willis v. State*; 43 Neb. 102; *Barney v. State*, 49 Neb., 515; *Savary v. State*, 62 Neb., 166.)
5. The giving of an instruction which is an inaccurate statement of the law is not reversible error if it is immediately withdrawn, and a proper instruction given in its stead.
6. A request for an instruction to the effect that defendants should be acquitted if there is evidence supporting any theory of their innocence is rightly refused.
7. The fact that the defendant in a criminal case stood his ground until an accusation was lodged against him is not, under all circumstances, evidence of innocence.
8. Where a defendant in a criminal case was asked on cross-examination whether he did not serve a term in a reformatory institution, and an objection to the question was sustained, and the jury directed to disregard it, *held*, that the incident was too trivial to exert any influence in the decision of the case.
9. While considerable allowance is made for professional enthusiasm in the argument of a criminal case, it is never permissible to ground an appeal for conviction upon facts not given in evidence at the trial.
10. It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence.
11. Under the rule that error must affirmatively appear, the burden is on the complaining party to show that an assertion of personal belief

by counsel for the opposing party was not given as a deduction from the evidence.

12. A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should seasonably object to the remarks complained of, and then enter an exception if the court rule adversely, or refuse to make a ruling.
13. It is not necessary that a jury in a criminal case should, in their verdict, fix the value of money stolen or embezzled. Courts will take judicial notice of the worth of a dollar.
14. Objection by an accused on the ground that there has been no preliminary examination for the crime charged should be by a plea in abatement. *Cowan v. State*, 35 N. W. 405, 22 Neb. 519.
15. For the purpose of lessening the credibility of a witness, a record of his conviction of a felony may be given in evidence; but such record is not conclusive, and the witness may show, notwithstanding the record, that he was in fact innocent.
16. Evidence examined and found sufficient to support the verdict.
(Syllabus by the court.)

Error to District Court, Douglas County; Hon. Irving S. Baxter, Judge.

William Reed and Reid Yates, convicted of larceny, bring error. Affirmed.

MacFarland & May, for the plaintiffs in error.

Frank N. Prout, Attorney General, and *Norris Brown*, for the State.

SULLIVAN, C. J. In this case we reach the conclusion, though with some doubt and hesitation, that there was before the jury sufficient evidence to warrant the verdict rendered. The defendants, William Reed and Reid Yates, were tried in Douglas County upon an information charging robbery, and were found guilty of larceny from the person. The testimony of the principal witnesses on both sides is far from satisfactory. Much of it is extremely improbable, and some of it altogether incredible. The conceded facts are these: On Friday afternoon, December 27, 1901, the complaining witness, Henry Bigel, an inexperienced and stupid old man, went down from Wisner to Omaha, and put up at the City Hotel. The next morning after breakfast he went out and visited some of the saloons in the neighborhood. He seems to have imbibed rather freely, and by 2 o'clock p. m. was considerably exhilarated, but not quite drunk. About this time he went into the saloon kept by defendants, and ordered

drinks for himself, William Carter, and one or two other persons who were standing around. When called upon to settle his bill, which was 65 cents, he said he had no money with him, but had some in his trunk at the Webster Street Depot. It was then arranged that Carter and Reed should go with him to the station, and bring the trunk back. Who suggested this arrangement does not appear, but it was satisfactory to all concerned, and was at once carried out. When the trunk was brought to the saloon, it was set down in an adjoining room, and opened in the presence of Reed and Carter. At the bottom was found an old rubber boot, from which Bigel extracted \$280 in bills. He put \$275 in his vest pocket, and handed Reid Yates \$5 for the purpose of paying his account at the bar. The change was returned to him, and he then, after treating everybody in the saloon, paid Reed and Carter 75 cents each for their services. Beyond this point the evidence is conflicting. The testimony of Bigel is that he was robbed and beaten by the defendants, and then thrown into the street. This also is Carter's version of the affair. On the other hand, the testimony of the defendants and their witnesses is to the effect that Bigel was neither robbed, beaten, nor ejected, but that he continued to drink until he fell into a drunken stupor at a table in one corner of the room, where he remained until evening. Evidently the jury, while believing that Bigel lost his money in the saloon, regarded the story of the robbery as incredible, and rejected it altogether. Their conclusion was that Reed and Yates got the money, but got it by theft, instead of robbery. Defendants contend that this conclusion does not rest upon any legal evidence, but we think it does. They either induced, encouraged, or permitted the old man to bring his trunk to their saloon, knowing that it contained money; and this of itself was a criminating circumstance. With knowledge of the fact that he had a large amount of money on his person, they furnished him intoxicants, until, according to their own testimony, his senses were benumbed to such an extent that he could neither perceive the dangers to which he was exposed nor guard against them. Their conduct was the conduct of conscienceless men. It was so reprehensible and wicked as to suggest the probability that it was inspired by a criminal motive. Worthy of consideration, too, is the circumstance that Carter and the defendants were the only persons who

knew Bigel had money on his person. It is intimated by counsel that Carter, who is apparently a disreputable character, may have, unknown to defendants, committed the crime. That is possible, but it is not probable. He could hardly have taken Bigel's money without being detected. He may be guilty, but that does not imply that defendants are innocent. After a careful reading of all the evidence, we are disposed to believe that the defendants committed the theft, and that Carter had knowledge of it, and shared in the proceeds.

It is contended that William Reed was not arraigned, and did not plead to the information, and that there was, therefore, as to him, no issue presented for trial. This point is technical, and the decision of it may properly rest upon technical grounds. The objection that the issue submitted to the jury was not formally made up was not raised in the trial court, and consequently cannot be considered here. Another answer to counsel's argument is that the motion for a new trial, being the joint motion of both defendants, was rightly dealt with as an entirety. *Dunn v. Gibson*, 9 Neb. 513, 4 N. W. 244; *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467; *Dutcher v. State*, 16 Neb. 30, 19 N. W. 612.

The eighth paragraph of the courts' charge was excepted to, and is, in the brief of defendants' counsel, subjected to severe animadversion. The instruction, which is an elaborate definition of a reasonable doubt, has been frequently challenged in this court, but never condemned. The giving of it was not reversible error.

There is a general complaint against other instructions, but we discover nothing in them that we think ought to have been omitted. Considered as a whole, the charge is an exceptionally good one. It is claimed that the court erred in giving instruction No. 1 requested by the State. This instruction was to the effect that a police officer might, without a warrant, arrest any person suspected, upon reasonable grounds, of being guilty of a felony. This was not an accurate statement of the law, but it was afterwards withdrawn, and a proper instruction given in its stead. There was, we think, no special reason for giving either the original or substituted instruction, and we are not able to see how either could have influenced the action of the jury in the slightest degree.

Defendants requested the court to charge: (1) That they

should be acquitted if any theory of their innocence was supported by evidence; and (2) that the fact that they made no attempt to escape should be considered as evidence of innocence. Both requests were rightly refused. The proposition embodied in the first is obviously unsound, and with respect to the second it is only necessary to remark that, when defendants learned that they were under suspicion, the opportunity to escape was gone.

Another reason advanced for a reversal of the judgment is that the deputy county attorney was guilty of prejudicial misconduct. One of the acts of alleged misconduct consisted in asking Yates, while on the witness stand in his own behalf, whether he had not served a term in the reform school. This question was not answered. An objection to it was sustained, and the jury directed to disregard it. In our opinion, the incident was too trivial to be counted as a possible factor in the decision of the case. A more serious question arises out of an expression used by the public prosecutor in his closing argument to the jury. In the course of his remarks he avouched his faith in the State's case by declaring that he believed the defendants guilty, and that he hoped God would send lightning from heaven and strike him dead if he did not so believe. Considerable allowance is made for professional enthusiasm, even in criminal cases, but it is not permissible to ground an appeal for conviction upon facts not given in evidence at the trial. We do not attach much importance to the offer of counsel to test the truth of his statement by ordeal. What he said in that behalf had no real significance. It was a mere rhetorical flourish. Calling spirits from the "vasty deep" or levin* from the sky is, in this materialistic age, a perfectly harmless diversion; for, however vehement the call may be, no answer is expected. But an assertion by the public prosecutor of his personal belief that an accused person is guilty as charged may, in a doubtful case, tell decisively in favor of the State, and, unless the belief is given as a deduction from the evidence, is, in the opinion of able courts, sufficient reason for reversing a conviction. In the present case, however, it does not affirmatively appear that counsel's assertion was not based entirely upon the evidence. From the record before us we are inclined to think it was. At any rate, we are not

(*) *Levin* and *leven*, are both obsolete words meaning *lightning*. J. F. G.

able to say that the error alleged is established. The court's attention was not directed to the remark at the time it was made, and it seems quite probable that this would have been done if it was regarded as unfair or unwarranted. It could hardly be made available as error if permitted to pass unchallenged. The rule upon this subject is thus stated in *Railroad Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 462: "A party desiring to take advantage of the misconduct of opposing counsel in the argument of a case should seasonably object to the remarks complained of, and then enter an exception if the court rule adversely, or refuse to make a ruling."

Another ground upon which defendants claim a reversal of the judgment is that the jury did not fix the value of the money stolen. The verdict states that defendants are guilty "of larceny from the person to the amount of \$275." This was sufficient. It is not necessary for a jury in any case to fix the value or worth of a dollar. The judges, as well as other people, know what it is. *Bartley v. State*, 53 Neb. 310, 73 N. W. 744. Courts take judicial notice of whatever is generally known within the limits of their jurisdictions.

It is said that the court erred in putting the defendants upon trial without a preliminary examination. This point was first raised after the jury had been sworn to try the case. It was then too late to consider it. It should have been presented by plea in abatement. *Cowan v. State*, 22 Neb. 519, 35 N. W. 405; *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Whitner v. State*, 46 Neb. 144, 64 N. W. 704.

A further contention of counsel for defendants is that the court erred in permitting Carter, who was a witness for the State, to testify on redirect examination that he was not guilty of an offense for which he had served a term in the penitentiary. In our opinion, the ruling was right. Carter was not a party to the action, and the judgment against him was not an estoppel. At common law conviction of an odious crime was a disqualification. It may now be considered only for the purpose of lessening the credibility of a witness. It was not, it seems, the fact of guilt that worked the disqualification, but only the sentence, based upon a judicial confession or the verdict of a jury. 1 Greenl. Ev. § 375; *People v. Herrick*, 13 Johns. 82 (N. Y.), 7 Am. Dec. 364. One might admit that he was a felon without forfeiting the right

to testify in court. The record of conviction is now evidence of guilt, and may be used to impeach a witness; but it is not conclusive evidence. It has the effect which the statute gives it, and no other or greater effect. But for section 330 of the Code of Civil Procedure, it would not be admissible for any purpose. *Sims v. Sims*, 75 N. Y. 466.

Other questions discussed by counsel are manifestly without merit, or else not raised by the petition in error.

The judgment is affirmed.

CURRIER V. STATE.

157 Ind. 114—60 N. E. Rep. 1023.

Decided June 18, 1901.

LARCENY: Sufficiency of evidence—Instructions—Argument of counsel.

1. Appellant contracted for a firm of plumbers to make certain changes in his greenhouse, for which he was to give them in advance secured promissory notes. They permitted him to haul to his premises, one thousand feet of their pipe to be used in the work. He then refused to give the notes as agreed, and demanded that they proceed, and on their refusal, hid the pipes, declaring he would not discover the hidden pipes, until they complied with certain demands of his. A search warrant was procured, but a large portion of the pipes were not found. Held, that where the first taking is a trespass, a subsequent appropriation is a felony; that the owners had not parted with the legal possession of the property; that appellant had broken his contract; that appellant's claim was groundless, not amounting to an honest belief; that whether the pipe was taken with a felonious intent was a question for the jury; and that the facts warranted a conviction for larceny.
2. Alleged improper remarks of the prosecuting attorney were not ground for reversal, because they were not followed by objection and motion to withdraw case from the jury.
3. In defining the crime of grand larceny, it was not necessary for the court to advise the jury as to the penalty.
4. Full and clean instructions having been given, it was not error to strike from an instruction asked, the following, "Larceny is something more than mere trespass."

Appeal from Circuit Court, Elkhart County; Hon. J. D. Ferrall, Judge.

William W. Currier, convicted of grand larceny, appeals. Affirmed.

Dodge & Dodge for the appellant.

W. L. Taylor, Attorney General, *Merrill Moores*, and *C. C. Hadley*, for the State.

DOWLING, J. The appellant was convicted upon an indictment for grand larceny. He contends that there was no evidence of his guilt, and that his request for a peremptory instruction to the jury directing his acquittal should have been sustained. The facts proved were these: The prosecuting witnesses, Charles H. Maloney and Edward Collins, co-partners, were plumbers engaged in business in the city of Elkhart, Elkhart County, Indiana. The appellant was the owner of a greenhouse in the same county. About November 1, 1900, he spoke to Maloney & Collins in regard to a change in the heating appliances in his greenhouse, and the substitution of pipes three inches in diameter for the one-inch pipe then in use. Maloney & Collins offered to furnish the new pipe and to put it in place for about \$450, but upon the express condition that the appellant should first secure them in the contract by the execution of his promissory notes for \$40 each, maturing monthly, to the full amount of the contract price of the pipe and the work of putting it in place, with one Lehman as surety. Appellant assented to this proposition, and Maloney & Collins ordered 1,000 feet of three-inch pipe from a Chicago house. Some 20 days later, when the pipe arrived at the railroad depot at the city of Elkhart, they authorized the appellant to haul it on his wagon to his farm, and to deposit it there for their use, which he did. Before proceeding further, Maloney & Collins demanded the execution of the notes, with the security promised. The appellant at first said that Lehman was out of the city. Afterwards, on being pressed by the prosecuting witnesses, he declared that Lehman was not worth anything. Maloney & Collins, however, expressed their willingness to accept Lehman as surety on the notes. The appellant then said he did not agree to give Lehman as his surety, but that Maloney & Collins were to put in the pipe, and that it was to remain their property until paid for. The prosecuting witnesses told him they had not made that agreement, and did not do business that way. On Saturday evening appellant said to Maloney & Collins: "I've got a notion to make you a proposition. I've a notion to tell you that you will have to pay me

\$50 damages if you don't start this job." One of the firm said to him: "We will be out Monday morning to get the pipe if you don't furnish the notes properly secured." The notes not having been executed according to the contract, Maloney & Collins went to appellant's farm on the following Monday to remove their pipe, but found only 60 feet of it. They then procured a search warrant, and returned to the farm in company with the constable. They saw wagon tracks leading into a field some 100 rods distant from appellant's barn, and, following the tracks, they discovered 260 feet of their pipe hidden in the tall grass and weeds in the field. Maloney & Collins left a man to watch the pipe, and returned the next morning to take it away. Appellant, in the meantime, had put up a sign on the fence inclosing the field with this inscription upon it, "No one allowed to trespass on this property." While Maloney & Collins were looking for the pipe, and before they had discovered it, the appellant said to them that the matter could be settled, and he would return the remainder of the pipe if they would connect up the old pipe in the greenhouse (which had been detached), or pay some \$7 for the expense of connecting it. He also said that he had hidden the pipe, and had carried it so far away that it would cost him \$3 to get it back. Maloney & Collins declined this offer. The constable told appellant he would give him until the next day to return the pipe. Appellant laughed at this, but said he would go to the store and see the firm that evening. He failed to do so. It was proved that appellant stated to one Roy De Camp that he had some trouble with Maloney & Collins in getting them to carry out their contract, and that he had taken the pipe as a means of protecting himself, and to make them do their job; that he meant to keep the pipe until he brought them to terms; that if he did not succeed they would never see the pipe again, and that he would put it where they could not find it. He asked this witness how long pipe would stay under water without spoiling. To another witness he said, "I took it (the pipe) over in the field, and I want them to replevin it."

About one month elapsed from the time the pipe was hauled from the depot to appellant's farm until Maloney & Collins went out to get it and bring it to their store. The quantity taken to the farm was 1,000 feet, which was worth \$300. The quantity discovered and taken back by the prosecuting witnesses was 640

feet, of the value of \$192. The portion never found, and totally lost to the prosecuting witnesses was 360 feet, worth \$108. It was shown that Maloney & Collins, at the request of appellant, had sent one of their men to the greenhouse to disconnect the old pipe; but this was no part of their contract, the appellant having undertaken to detach and remove the old pipe.

The claim is made on behalf of the appellant that he took the property honestly, under a claim of right to its possession. It is impossible to adopt this view. Neither the title to the pipe nor the right of possession was vested in the appellant. True, the pipe was deposited on his land, but it was there as the property of Maloney & Collins. It was there just as a box of their tools might have been. By the express terms of the contract, and as a condition precedent, the appellant was to make the prosecuting witnesses safe by the execution of promissory notes for the contract price, with Lehman as his surety. After procuring the pipe, the firm refused to proceed a single step until this condition was complied with. Having broken his agreement without excuse, and after putting the prosecuting witnesses to great expense and inconvenience, the appellant made a groundless claim against them the pretext for depriving them of their property. He fraudulently appropriated and then concealed it. Through the instrumentality of an officer and a search warrant, a part of the property was recovered. A considerable portion was never found, and its owners were permanently deprived of it. The wrongful appropriation and concealment of the property by the appellant, in the absence of its owners and without their consent, and the refusal of appellant to return it, except upon the payment by the prosecuting witnesses of a fictitious and fraudulent claim, constituted a felonious taking and appropriation, and was larceny under the statute. According to the appellant's own confession, he intended to compel the owners of the property to settle with him *on his own terms*, to pay a claim they did not owe, or to perform work they were under no obligation to perform, or lose their property. The case readily falls within the well-recognized rules relating to the crime of larceny. "The mere delivery of property to another for a special purpose vests in the person receiving it only the temporary charge or custody; the possession of the property remains in the owner and a conversion of it is larceny. * * * So, a delivery of property on condition of

immediate payment does not transfer the right of possession to such property until the performance of the condition, and, if the receiver wrongfully retain it without making payment and with felonious intent, he is guilty of larceny. * * * To constitute a crime of larceny, a felonious intention is, as a general rule, an indispensable ingredient. * * * This intent must have been either to appropriate the property to the use and benefit of the taker (though he need not necessarily dispose of it to establish such intent), or to wholly and permanently deprive the owner of it; and taking property with intent to conceal it, for the purpose of inducing the owner to offer a reward for its return, and to obtain the reward, is sufficient to constitute the crime." 12 Am. & Eng. Ency. Law (1st Ed.) pp. 768, 769, 776, 777; *State v. Anderson*, 25 Minn. 66, 33 Am. Rep. 455; *Robinson v. State*, 113 Ind. 510, 16 N. E. 184; *Davis v. State*, 10 Lea (Tenn.), 707; *State v. Homes*, 17 Mo. 379, 57 Am. Dec. 269, and notes; *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506; *Best v. State*, 155 Ind. 46, 57 N. E. 534; *Stillwell v. State*, 155 Ind. 552, 558, 559, 58 N. E. 709. It is not a defense to a charge of larceny that the defendant had "an impression" that he had a claim to the property taken. This is not equivalent to an "honest belief." *Morrisette v. State*, 77 Ala. 71.* Where the taking in the first instance is a trespass, the subsequent appropriation is a felony. *Regina v. Riley*, 14 Eng. Law & Eq. 544. Whether the appellant took and appropriated the pipe with a felonious intent was a question for the jury. Under the authorities, the proof was amply sufficient to authorize the conclusion that the property was so taken. *Morningstar v. State*, 55 Ala. 148; *Johnson v. State*, 73 Ala. 523.

The alleged misconduct of counsel for the State on the final argument of the case was one of the grounds upon which a new trial was demanded. So far as the record shows, no objection to the supposed statements of counsel were made at the time, nor was there a motion to set aside the submission and to withdraw the case from the jury. Under these circumstances, no question

* The above citation is as it appears in the Southern Reporter, and is correct; but the official report cites it as *Miller v. State* 77 Ala. 71. There is no such case. *Miller v. State* 77 Ala. 41 is a burglary case and does not bear on the question under consideration.

as to such misconduct is presented to this court. *Blume v. State*, 154 Ind. 343, pp. 354-357, 56 N. E. 771.

The remaining errors discussed by counsel relate to instructions given and refused. In stating to the jury the statutory definition of "grand larceny," the court was not required to say what the penalty for that offense was. The jury could only find by their verdict whether the appellant was guilty or not guilty as charged, and whether he was under 30 years of age. They had nothing to do with the penalty for the crime.

The modification of instruction No. 6, tendered by appellant, by striking therefrom the words, "Larceny is something more than mere trespass" did not constitute reversible error. Full and clear definitions of the crime with which the appellant was charged were given, and the jury were properly instructed as to the difference between a mere trespass and the crime of larceny. The peremptory instruction for a verdict of not guilty demanded by the appellant was properly refused. We find no error in the record. Judgment affirmed.

BAKER, J., took no part in this decision.

NOTE (By J. F. G.)—The court is clearly wrong in holding that misconduct of a prosecuting attorney in his closing argument is waived, if the defendant does not move "to set aside the submission and to withdraw the case from the jury." In a criminal case, the defendant is entitled to a speedy trial, and when the jury is sworn, to have the case submitted to the jury for a verdict. If the doctrine announced in the above opinion is correct, then a prosecuting attorney who has made out a weak case can, if the trial judge permits it, be guilty of the most flagrant misconduct in his closing argument, thereby putting the defendant to his election, to either waive the error or to waive his right to a speedy trial. The injustice of such a doctrine is manifest. It is the duty of the trial judge to restrain counsel on either side from violating the well established and reasonable rules regulating arguments to juries, and, when a prosecuting attorney persists in improper and prejudicial remarks, and obtains a verdict of guilty, the judge should grant a new trial, unless it is apparent that the verdict would have been the same regardless of the misconduct.

STATE V. CONNOR.

118 Iowa 490—92 N. W. Rep. 654.

Decided December 17, 1902.

LARCENY—CIRCUMSTANTIAL EVIDENCE: *Pocket picking on railway train—Sufficiency of evidence—Efforts to escape—Instructions—Sentence not excessive—Indictment.*

1. Evidence tersely stated in the opinion, held sufficient to sustain a conviction of guilty.
2. The crime proven being of a grave character, and evidently perpetrated by hardened criminals, a sentence of ten years imprisonment, ordered by a judge who heard all of the evidence, though severe, not ground for reversal.
3. It being shown that defendant made an effort to escape, it was not error for the court to instruct the jury that such evidence could be considered against him.
4. It is sufficient to describe the stolen money in the indictment as being one hundred and ten dollars "as current money of the United States."

Appeal from District Court, Hancock County; Hon. C. H. Kelley, Judge.

Indictment for larceny from the person. Defendant appeals. Affirmed.

A. C. Ripley and H. N. Boardman, for the appellant.

C. W. Mullan, Attorney General, and *C. A. Van Vleck*, Assistant Attorney General, for the State.

WEAVER, J. 1. The first point made in support of the appeal is upon the sufficiency of the evidence to sustain the verdict. We have examined the record with considerable care, and conclude that the finding of the jury should not be interfered with upon this ground. The testimony tends strongly to show the following facts: On the day in question the defendant, with two or three other persons, were seen in the town of Garner. They were strangers there, and carried no baggage. They went first to the station of the Burlington, Cedar Rapids & Northern Railroad, and made inquiries about passage west to Buffalo Center. Later they were at the station of the Chicago, Milwaukee & St. Paul Railroad when the prosecuting witness, Cummings, purchased a ticket for the eastbound train, and before the train arrived defendant was seen in consultation with others of the party

outside of the depot. Upon the arrival of the train, the defendant and his comrades, and perhaps others, got upon the platform of the car with, or just ahead of, the prosecuting witness, whose pocket was picked as he pressed his way through the crowd. He detected the movement, and at once seized one of the defendant's party called Williams as the thief. He testifies that, as he laid hold of Williams, the defendant made a move with his hand down by Williams' side, and immediately he (Cummings), while retaining his grip upon Williams with one hand, seized defendant with the other, and asserted that the pocketbook had been passed to the latter. While engaged in this struggle with these two persons, a third party pressed in and struck Cummings, compelling him to loose his hold of the accused persons. After some confusion the train was stopped. Williams was found in the water-closet of one of the cars, and defendant in a seat in the rear coach. Being compelled to leave the train, defendant first walked east a distance, and was seen to throw something away, then turned back to town, where he was arrested. Upon search at the point where he turned back, a loaded revolver was found, but the pocketbook does not seem to have been recovered. These, with other circumstances developed in testimony, we think justified the jury in finding him guilty.

2. It is also urged that the sentence imposed by the court—imprisonment for a term of 10 years—is excessive. It is no doubt severe. But it is to be remembered that the crime of which the defendant is convicted is of a very grave character. It is an offense not only against property, but against the person as well, and is rarely committed except by those who are experienced and hardened in the ways of vice and crime, and the punishment may properly be made heavy enough to discourage, if possible, its practice. The trial court had the defendant before it, and heard all the evidence offered, and we find no sufficient reason for revising its judgment in this respect.

3. Exception is taken to the sixth paragraph of the court's charge to the jury to the effect that if defendant, after being charged with the offense, attempted to escape or avoid arrest, it was a circumstance which ought to be considered against him in the finding of the verdict. It is said there is no evidence of this kind. It is shown, however, that, after Cummings had charged him and Williams with the crime, and they had been rescued

from his grasp by the interference of a third party, they did not remain to explain or insist upon their innocence, but one concealed himself in the water-closet, and the other went into another car. It is also shown, as we have seen, that when he left the car he first started in a direction away from town. These circumstances were for the jury to consider, and, if these movements were believed to have been made in an attempt to escape or evade detection, the unfavorable inference mentioned in the instruction could properly be drawn therefrom.

4. The indictment is attacked as being indefinite and uncertain because it does not state the particular kind of money charged to have been stolen. The money is described as being \$110 "in current money of the United States." We see no reason for requiring a more exact or specific description. The essential thing to be made known is the kind of property charged to have been stolen, and its alleged value. The property in this case was "current money of the United States." The precise amount in the various kinds of coins, bills, notes, and certificates would under most circumstances be impossible to prove with any certainty, and, if it should be held necessary to make the allegations thus minutely, prosecutions for theft of money would ordinarily be abortive. *State v. Alverson*, 105 Iowa, 152, 74 N. W. 770; *State v. Fisher*, 106 Iowa, 658, 77 N. W. 456; *State v. Hanshaw*, 3 Wash. St. 12, 27 Pac. 1029; *Randall v. State*, 132 Ind. 539, 32 N. E. 305.

It is also said there was error in overruling certain objections to the testimony of the State's witnesses, and that the form of the verdict is irregular.

Without taking time to discuss these assignments separately, we are of the opinion that the points are not well taken, and the judgment of the District Court must be affirmed.

STATE V. WILLIAMS.

118 Iowa 494—92 N. W. Rep. 652.

Decided December 17, 1902.

LARCENY—STATUTORY INDICTMENT: *Description of stolen property sufficient under statute—Circumstances indicating guilt—Verdict need not*

state "market value" of stolen property—Sentence of ten years at hard labor, not excessive.

1. Under an Iowa statute providing that an indictment shall not be considered insufficient, because of any matter that was formerly so considered, which does not tend to prejudice the substantial rights of the accused on the merits, a description of alleged stolen goods as "a certain dark-colored pocketbook and its contents, consisting of one hundred and ten dollars in current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to the grand jurors unknown," is sufficient.
2. If the descriptive matter was insufficient in itself, it became sufficient by the averment, that "a more particular description of which is to the grand jury unknown."
3. It was competent to show what the accused was doing, and with whom he was at a time, near to, and prior to, the offense.
4. It was not error to direct the jury's attention to the evidence, that the accused immediately after the offense locked himself up in a closet in the railway train on which the offense was committed; such being a circumstance that the jury could consider.
5. It was not necessary for the jury to find the *market* value of the stolen goods.
6. Under the evidence a sentence of ten years at hard labor in the penitentiary was not excessive.

Appeal from the District Court of Hancock County; Hon. C. H. Kelley, Judge.

The defendant was indicted jointly with others for larceny from the person; the maximum statutory penalty for which, was fifteen years in the penitentiary. He was separately tried and sentenced to ten years at hard labor in the penitentiary, from which conviction he appealed. Affirmed.

A. C. Ripley and H. N. Boardman, for the appellant.

Charles W. Mullen, Attorney General, and Charles A. Van Vleck, Assistant Attorney General, for the State.

MCCLAIN, J. So far as the facts are material for the determination of this appeal, the evidence as set out in the record tends to show the following: That one Cummings, while entering a railroad car as a passenger, and while upon the platform of the car, was jostled by defendant and others, and his pocketbook was stolen from his inside vest pocket; that, upon an outcry being made by Cummings, this defendant got off the platform of the car where Cummings was, and, passing along the next passenger car on the side opposite from the station platform where

the train was standing, entered the second car from the place where the larceny was committed, and, passing through that car, entered the toilet room, locking the door after him; that, on demand of the conductor, he came from the toilet room, and was put off the train and placed under arrest by persons who were interesting themselves in finding the person or persons who committed the larceny. The testimony of Cummings identified the defendant as the person who took his pocketbook, although it was not found in defendant's possession.

One assignment of error is as to the sufficiency of the description, in the indictment, of the property which defendant is alleged to have stolen. The portion of the description complained of is, "a certain dark-colored pocketbook and its contents, consisting of one hundred and ten dollars in current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to this grand jury unknown." This question has recently been passed upon by this court with reference to an indictment in which the description was "twenty-two dollars and fifty cents in lawful money of the United States, of the value of twenty-two dollars and fifty cents," and it was held that the description was sufficient. *State v. Fisher*, 106 Iowa, 658, 77 N. W. 456. Certainly the description in the indictment now before us is equivalent to that which is upheld in the case just cited. While such description has been held not sufficient at common law, there have been statutes in many of the States particularly modifying the common law in this respect, under which such description has been held good. *Brown v. People*, 29 Mich. 232; *Hammond v. State*, 121 Ind. 512, 23 N. E. 515; *Randall v. State*, 132 Ind. 539, 32 N. E. 305; *State v. Freeman*, 89 N. C. 469. Our general statutory provision with reference to the sufficiency of an indictment, which declares that no indictment shall be held insufficient for any matter which was formerly a defect or imperfection, and which does not tend to prejudice the substantial rights of the defendant upon the merits (Code, § 5290), would seem to serve the same beneficial purpose as the specific statutes found in these states with reference to indictments for larceny. Moreover, if there were any insufficiency in the description, it is cured by the allegation that a more particular description of the property is to the grand jurors unknown—that appearing from the evidence to be the fact. *This-*

holm v. State, 45 Ala. 66; *State v. Fisher*, 106 Iowa, 658, 77 N. W. 456; *Ridgeway v. State*, 41 Tex. 231.

Some question is made as to rulings in the admission of testimony of witnesses as to the persons in whose company defendant was seen on the day when the crime was committed, and prior to its commission. We see no error in these rulings. It was certainly competent to show what the defendant was doing, and with whom he was seen, at a time near to and prior to the commission of the offense. The assignment requires no further discussion.

Another assignment of error relates to the giving of an instruction in which the jurors were told that, if they found beyond a reasonable doubt that the pocketbook was stolen from Cummings, and that immediately thereafter the defendant attempted to escape or avoid arrest, such attempt might be considered as a circumstance tending to show his guilt, and that they might give such weight to the same, if any, as they believed it clearly entitled to. The complaint is that the evidence did not justify an instruction on the subject, and that the instruction given places undue emphasis on the circumstances shown as indicating an attempt to escape. We find, however, that there is no merit in either of these contentions. Certainly the fact that defendant went from the place where the crime was committed immediately on an outcry being made, and locked himself in a toilet room while the train was still standing at the station, was entitled to consideration as showing an attempt to escape, and while that act would not, of course, necessarily show guilt, and might be sustained as consistent with innocent motives, such as a desire to avoid trouble or unjust suspicion or detention, the weight and consideration to be given to it were for the jury. The instruction does not do more than direct the attention of the jury to the fact as one which they may consider. It is a correct statement of the law, and, in the absence of any request for further instructions or qualifications, it was not erroneous as applied to the facts. Although the court embodied this proposition in a different instruction from that in which it referred to the sufficiency of proof by circumstantial evidence, nevertheless we see no error in doing so. It is not required to embody the whole law as to the case in one instruction.

It is complained that in the verdict the jury found simply the value of the property stolen, and not its market value. There is

nothing in the statute requiring that a verdict shall show that the finding was of the market value.

We are asked to reduce the sentence, which was of imprisonment at hard labor for a period two-thirds of that allowed by the statute as the maximum punishment. If defendant was guilty, he was guilty of an atrocious offense, under circumstances indicating willfulness and deliberation. We see no reason to think that the sentence was excessive. As to the objection that the sentence was to imprisonment at hard labor, it is sufficient to say that under Code, § 5675, "all punishment in the penitentiary by imprisonment must be by confinement to hard labor." The sentence, therefore, followed the law, although it was unnecessary to expressly specify hard labor as a part of the sentence.

We find no error in the record, and the judgment of the lower court is affirmed.

ROBBERY.

Introductory remarks by J. F. G.

Mr. East defines a robbery, as a "*felonious taking of money or goods, of any value, from the person of another, or in his presence against his will, by violence or by putting him in fear.*" (2 East, P. C. 707.) This definition is adopted by both Mr. Russell and Mr. Roscoe. (1 Russell on Crimes 867; Roscoe's Criminal Evidence 733.)

Generally speaking, within this definition, a robbery is an aggravated larceny, or, a larceny with aggravated features added; yet, there have been many cases in which the act of taking, destitute of the aggravated features, would not be larceny,—thus begging with a drawn sword, if the menace is so intended and causes the giver to part with his property through fear, would be robbery; while eliminating the element of fear, it would not be larceny, for, in such case the owner voluntary parts with his property, and, the property would be received with his consent.

Robbery is generally committed by actual violence or force; but the crime is complete if the property is taken in the presence of the owner by putting him in fear; also, there are cases reported, in which it was held, that obtaining money by threats to accuse the owner with an unnatural crime is robbery.

In robbery, the value of the thing taken is immaterial; for the law does not draw the distinction as it does in larceny, between small and great thefts, the controlling feature being the manner in which the thing is taken and not the value of it. But, conceding that the value is immaterial in determining whether the offense is robbery or not, the value together with other circumstances is often very material; for the taking of an article of small value, may under some circumstances indicate merely a rude or hilarious act, where the taking an article of great value under similar circumstances would clearly indicate a felonious intent. For example,—upon some hilarious occasion one person in the course of the merriment, enters into a scuffle with another and forcibly and against his will, takes from his person a nickel, and immediately spends it. Under the circumstances, this certainly would not be the heinous crime of robbery, and it may well be doubted whether any level-headed judge or jury would even hold it to be the crime of larceny; but if the amount taken and appropriated were one hundred dollars, a criminal intent would be manifest, at least if the parties were of moderate means. Too often are efforts made to magnify ordinary thefts or trespasses into the grave crime of robbery; sometimes through the promptings of revenge, and, at other times through the false idea entertained by overzealous prosecuting attorneys,

that a public prosecutor's duty is to secure a conviction, and that, of the highest possible grade, rather than to attain the ends of substantial justice.

The crime of robbery is often termed "highway robbery," which term well illustrates its character. It was doubtless designed to protect those who were traveling, or going to and fro, on the King's highway;—to prevent the robbing of stage coaches;—to insure safety in public places, and not, by *technical construction* to apply to ordinary trespasses and petty thefts.

Requisite force—Resistance:—To constitute robbery by force there should be a meeting of force and resistance. After commenting on the *Lapier case* (Ante), Mr. Russell says:—"It should, however, be observed, with respect to cases of this description, that though it may have been formerly holden that a sudden taking or snatching of any property from a person unawares was sufficient, the contrary doctrine appears to be now established; and that no taking by violence will, at the present day, be considered as sufficient to constitute robbery, unless some injury be done to the person, as in the case last cited, or unless there be some previous struggle for the possession of the property, or some force used to obtain it." (1 Russell on Crimes 871.)

The force must precede, not follow the taking:—This proposition is treated in *Jones v. Commonwealth* and notes (*post*), and in *Jackson v. State* (*post*), which renders comment at this place unnecessary.

Taking and carrying away:—To constitute robbery by force from the person, the property, if but for a moment, must be severed from the physical possession of the owner, and be in the actual possession of the taker. A man having his purse fastened to his girdle, was assaulted by a thief, who in an attempt to get the purse, cut the girdle, causing the purse to fall to the ground. This was held not to be robbery; for the thief did not pick it up, or get physical possession of it. So, where one carrying a feather bed, was by threats, required to lay it down, but the thief being apprehended before he could pick it up, it was held, that the crime of robbery was not completed. A robber took from a gentleman his purse and then returned it saying: "If you value your purse, please take it and give me the contents of it"; but was immediately apprehended without receiving the money. It was held that the robbery was complete, the thief having first secured possession of both the purse and the money. In *Lapier's case* it was held that snatching a lady's valuable earring with sufficient force to tear it from the ear was robbery, although the ring remained among the curls of her hair; but this case seems to stand more on the peculiar features of the case than on exact reasoning. We criticise the decision more fully in our review of larceny where other cases are cited upon the question of taking and carrying away. In those jurisdictions where it is by statute declared a crime to attempt to commit larceny or robbery, the indictment may be so framed, that in close cases, the jury may acquit of the higher and find guilty of the lower grade of the offense.

Something of value must be taken: On this subject, Mr. Russell says:—

"The taking may be of money or goods 'of any value'. The value, therefore, of the property taken is quite immaterial: a penny as well as a pound, forcibly extorted, makes robbery; the gist of the offense being the force and terror. Thus the taking of a slip of paper, which contained a memorandum of a sum of money due to the prosecutor, has been held sufficient. But something must be taken, and it must be of some value; otherwise the offense will be only that of an assault with intent to rob; but it need not be of the value of any known coin, even of a farthing.

"The property taken must not only be of some value, but it must be taken from the peaceable possession of the owner. In a case where the prisoner had obtained a note of hand from a gentleman by threatening with a knife held to his throat to take away his life; and it appeared that the prisoner had furnished the paper and ink with which it was written, and that the paper was never out of her possession; it was holden not to be robbery. The judges were of the opinion that the note was of no value; that as the legislature at the time of passing the 2 Geo. 2, c. 5, s. 3, whereby the stealing a *chose* in action was made a felony, could not possibly have a case like this in contemplation, it was not within that act of parliament; that the note did not, on the face of it, import either a general or a special property in the prosecutor; and that it was so far from being of any the least value to him, that he had not even both the paper and ink were the property of the prisoner, and that the delivery of it by her to the prosecutor could not, under the circumstances, be considered as vesting it in him, but that if it had, as it was the property of the paper on which it was written, as it appeared that a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, so as to constitute the crime of robbery.

"A robbery cannot be committed unless the party has the property in his peaceable possession to do with it what he chooses. The prisoners were indicted under the 7 & 8 Geo. 4, c. 29, s. 6 (now repealed), for feloniously demanding of Mr. Gee, with menaces, a deed, and a valuable security, and it appeared that they had decoyed the prosecutor into a house, and then forced him into a retired place, so constructed that no cries could be heard, where they pushed him down on a bench, and a chain was passed across his breast and a rope around his neck, and his legs were fastened with a chord to some staples in the ground; whilst he was so fastened, two sheets of paper, pens, ink were brought to him, and he was compelled to write on the paper so brought to him a check for a sum of money, and a letter requesting certain deeds to be delivered to the bearer; these documents remained with him for half an hour while he wrote some letters, and it was contended that as they were in his possession during that time, the case was distinguishable from the preceding one. Patteson, J. 'Mr. Gee was chained and padlocked, a rope was put around his neck, and he could not move hand

or foot except just to write; they bring him pens, ink and paper, and he writes the orders; he had the papers it was true in his hands; but chained as he was is it possible to conceive that he had such a peaceable possession of them as to be at liberty to do what he pleased with them? For this is the meaning of peaceable possession. I cannot perceive the difference between the case of Curtois and the present, except that the latter is the stronger of the two. The ground of the decision in that case must govern the decision of the court in this case. A robbery cannot be committed unless the person has the property in his peaceable possession to do with as he chooses. If Mr. Gee had brought the documents ready written the case would have been different, but he does not write them until he is chained." (1 Russell on Crimes, 869-70).

Criminal intent—Honest intentions—Taking under color of purchase:
—On these questions Mr. Russell says:

"The taking must in all cases be accompanied with a felonious intent, or *animus furandi*; but if a man *animus furandi* say:—'Give me your money,'—'Lend me your money,'—'Make me a present of your money,' or words of the like import, they are equivalent to the most positive order or demand; and, if anything be obtained in consequence, such a taking will be within the definition of robbery. There is, however, a case of considerable nicety, which should be here noticed, where, though the original assault was with a felonious intent, the taking of the goods was holden to be no more than a trespass. A. assaulted B. on the highway with a felonious intent, and searched the pockets of B. for money, but finding none, he pulled off the bridle of B.'s horse and threw that and some bread which B. had in pannels about the highway, but did not take anything from B; and it was resolved, upon a conference with all the judges, that this was not a robbery, because nothing was taken from B. But it is remarked upon this case, that the better reason for the decision seems to be, that the particular goods were not taken with a felonious intent, as surely there was a sufficient taking and separation of the goods from the person.

"If a party *bona fide* believing that property in the personal possession of another belongs to him, take that property away from such person with menaces and violence, this is not robbery; and it is for the jury to say, whether or not the prisoner did act under *bona fide* belief. Upon an indictment for robbing Green of three wires and a pheasant, it appeared that the prisoner had set the wires, in one of which a pheasant was caught and Green, game-keeper of the manor where the wires were set, took up the wires and the pheasant, and put them in his pocket, the prisoner soon after came up, and said, 'have you got my wires?' Green replied that he had, and a pheasant that was caught in them. The prisoner then asked Green to give the pheasant and wire to him, which Green refused: whereupon the prisoner lifted up a large stick, and threatened to beat Green's brains out if he did not give them up. Green fearing personal violence did so. For the prosecution it was contended that the prisoner had no property either in the wires or the pheasant. Vaughn B., 'If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable for a trespass in setting them, it would not be a robbery. The game-keeper had a right to take them,

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and when so taken they never could have been recovered from him by the prisoner; yet still if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretence, it would be robbery. The question for the jury is, whether the prisoner did honestly believe that he had a property in the snare and pheasant or not.'

"Some questions as to the felonious intent have arisen where the property has been taken under colour of a purchase. Thus, though it is clear that if a person by force, or threats, compel another to give him goods, and by way of colour oblige him to take, or if he offer, less than the value, it is robbery; yet it has been doubted, whether the forcing a higler or other chapman to sell his wares, and giving him the full value of them amounts to so heinous a crime as robbery. So that where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given. It is suggested, however, with much reason, that questions of this kind should properly be referred to the consideration of the jury; and that the circumstance of the full value or more being offered at the time should be left to them to shew that the intention of the party was not fraudulent, and so not felonious. For though it does not necessarily follow as a conclusion of law, that if the value of the thing taken be offered to be paid at the time, the intent, is therefore, not felonious: yet it is submitted, that such a circumstance would be pregnant evidence in the negative. But cases where the owner is induced to part with his property at less than its value, by fear of violence of any individual, or of the outrages of the mob, come under a different consideration, and constitute a sufficient taking, with felonious intent." (1 Russell on Crimes, 871-73.)

In the indictment, the ownership of the property should not be laid in an employe or servant of the owner: We have treated on this subject in our review of larceny (*ante* 373). The point is sustained in *State v. Beaty* (*ante*), and *State v. Moreledge* (*post*).

The ownership may be laid in a minor, where the money taken, is wages paid by a father to his minor son, or received by an emancipated minor from a third person. This doctrine does not apply to cases where the goods taken are wearing apparel, school books, or other articles furnished by the father because of his duty to care and provide for his children. In the one case the minor holds the money as his property, while in the other he simply receives the custody of it, for his use, the father retaining the property in the goods. See, *Dorsey v. State* (*post*).

In concluding these fragmentary suggestions, it may be proper to remark, that while the crime of robbery is one, that by reason of the suddenness and brutality which usually accompanies the attack, it is justly regarded and condemned as a heinous crime against society, it is, at least in large cities, a natural result of conditions, both permitted and favored by the condemning public. The "robber" of our metropolitan cities is usually one, who becomes such as a victim of circumstances, and, does not like the more refined criminals select the course

of crime as one conducive to prosperity. He is largely the child of circumstances, and the product of selfish policies inaugurated by those who most bitterly condemn him. He is usually one of moderate intelligence and meager education, who by reason of his crude condition is barred from favored opportunities. His early life may have been surrounded by an atmosphere of poverty, ignorance and dissipation; his religious education, that of faith and form instead of moral and intellectual development; his ideals of manhood, the supremacy of brute force, and, his aims and hopes circumscribed by the allurements of the ever present lower-grade saloon and other debasing influences. With such influences operating on his youthful mind he approaches manhood an easy victim to the corrupting agencies of city life. The results of his labor are absorbed by the saloon, the race track, or other degenerating and deceptive haunts, which, with open doors offer entertainment consistent with his crude ideas of social life.—Yet, he has not become a criminal.—He is willing to toil for meager wages and face the world with reasonable honesty, spending only that which he earns; but recklessly spending it all; until by reason of circumstances beyond his control, employment ceases and his humble prosperity is at an end. This may be, as is most likely, in the chilly season of winter when opportunity closes its doors against the unfortunate. With companions, similarly situated, tales of woe are interchanged and, ways and means discussed, and, *discussed in the light of their dark environments.* Hunger and cold, with a long season of inactivity, faces them; while prosperity is present with others, less deserving. The logic of necessity prevails, and, violence is resorted to as a temporary means of livelihood. Here starts the "robber" on a career of crime, soon to be arrested, convicted and placed beyond the indulgence of society. In many instances, a less indulgent view may be taken of the "robber"; but if society, in its social, religious and political phases, acted with more justice and humanity to the unfortunate classes, and created conditions more favorable to the moral, intellectual and industrial education of the youth, the brutal crimes would be less prevalent.

JONES V. COMMONWEALTH.

115 Ky. 592—24 Ky. Law Rep. 2481—74 S. W. Rep. 263.

Decided May 20, 1903.

ROBBERY: *Force must precede, not follow the taking of the property—Instructions.*

1. To constitute robbery, the force or intimidation must precede the severing of the property from the possession of the owner.
2. If the money is stealthily taken from the pocket of the owner, who immediately attempts to regain possession of it, and is forcibly resisted; the offense is larceny and not robbery.
3. It was error to instruct the jury,—that, if the money in question was

taken from the person of the owner by stealth, and the owner immediately attempted to regain possession of it, but was forcibly resisted, that such constituted a forcible taking.

Appeal from Circuit Court, Fayette County.

"To be officially reported."

Frank Jones, convicted of robbery, appeals. Reversed.

Julian B. Bourne, for the appellant.

C. J. Pratt and *M. R. Todd*, for the Commonwealth.

PAYNTER, J. The indictment charges that the appellant "did unlawfully, willfully, feloniously, and with force and violence, and by putting in fear one A. B. Tilton, take from his person and presence ten dollars in United States currency, bank notes, gold and silver coin, commonly known as money, the personal property of said A. B. Tilton, with the felonious intent to permanently deprive the owner thereof, and to permanently convert the same to his own use."

On the trial of the case *A. B. Tilton*, referred to in the indictment, testified that he was in the betting shed of the Kentucky Trotting Association, looking at the pool sellers' bulletin; that he had \$10 in his vest pocket; that the defendant was standing in front of him, with his back to him; that while in that position he felt something touch his breast; that he immediately grabbed and looked down, when he saw defendant's hand, which he had grabbed, was 12 or 14 inches from witness' vest pocket; that defendant pulled and tried to get away, and slipped the money from his right to his left hand. From the facts proven it is evident that the money was taken from Tilton by stealth. The party was not put in fear; neither was violence used in taking the money.

This court in *Commonwealth v. Prewitt*, 82 Ky. 240, defined robbery in the language of the common law, which is "the felonious and forcible taking from the person of another of goods or money to any value by violence or putting him in fear."

This court in other cases has recognized this as the proper definition of robbery.

No violence was employed in taking the money. It is true that, after Tilton discovered that his money had been taken, he sought by force, which the defendant resisted, to regain possession of it, and prevent his escape. At the time the defendant was seized,

he had the money in his possession. The asportation was complete. He had the money as much in his possession when his hand was seized as he would have had had more time elapsed. He had succeeded in placing it in his pocket or in the hands of an accomplice. The force used did not accompany the taking of the money, but in resisting an effort to regain possession of it.

In Blackstone's Commentaries, vol. 4, p. 242, it is said:

"This previous violence or putting in fear is a criterion which distinguishes robbery from other larcenies; for if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is not robbery the fear is subsequent."

It is said in Archbold's Criminal Practice, 508:

"It may be observed, with respect to the taking, that it must not, as it should seem, precede the violence or putting in fear; or, rather, a subsequent violence or putting in fear will not make a precedent taking, affected clandestinely, or without either violence or putting in fear, amount to robbery."

The court below evidently tried the case upon the theory that the resistance by the defendant of the force used by Tilton to regain his money made it a case of robbery instead of larceny; therefore the court gave the following erroneous instruction:

"If the defendant, by stealth merely, got and retained or transferred to the possession of another money, the property of A. B. Tilton, this was not a taking by force. If the defendant, by stealth, got possession of money, the property of A. B. Tilton, by taking said money from the person of said Tilton, and immediately before said defendant had secured the money to himself or transferred to another said Tilton discovered the taking, and then and there by the use of physical force attempted to regain possession of the money while said money was in the possession of the defendant, and the defendant then and there by the use of physical force prevented said Tilton from retaking said money, and either retained it himself or fraudulently transferred it to the possession of another, this was a taking by force." The fact that force was used by defendant after the money had been taken could not relate back to the act of taking, so as to be considered force accompanying that act. The taking of the money was larceny.

The judgment is reversed for proceedings consistent with this opinion.

NOTE (By J. F. G.).—In speaking of this phase of the subject, Sir Matthew Hale, says:

"Harman was indicted of the robbery of *Halfpenny* in the highway, and upon the evidence it appeared, that *Harman* was upon his horse, and required *Halfpenny* to open a gap for him to go out, *Halfpenny* going up the bank to open the gap, *Harman* came by him and slipt his hand into his pocket, and took out his purse; *Halfpenny* not suspecting the taking of his purse, until turning his eye he saw it in *Harman's* hand, and then demanded it. *Harman* answered him, *Villian if thou speakest of thy purse, I will pluck thy house over thine eads, and drive thee out of the country, as I did John Somers*, and then went away with his purse; and because he took it not with such violence, as put *Halfpenny* in fear, it was ruled to be but stealth, and not robbery, for the words of menace were used only after the taking of the purse, wherefore he was found guilty only of larciny, and had his clergy." (1 Hale's Pleas of the Crown, 534.)

N. B.—In the above quotation, the italics, punctuation and spelling are the same as they appear in the book from which it was copied.

Another Kentucky case:—In *Dawson v. Commonwealth*, 25 Ky. Law Repr. 5, 74 S. W. Rep. 701, decided May 22, 1903, the court followed the decision in *Jones v. Commonwealth* and also held, that, as the evidence showed a case of petit larceny, followed by force, that the court should have instructed the jury as to petit larceny. The following is the opinion of the court:

PAYNTER, J. The appellant was tried and convicted upon a charge of robbery. The prosecuting witness, Louis Curts, and the accused lived on the same alley in the city of Louisville. While they were engaged in a conversation at the gate of the accused, she put her hand in his pants pocket, when he grabbed her hand, and said, "Don't play with my money in that way," and she said, "I have not got your money." He replied, "Yes, you have," then she laughed. He testified that he let her take her hand out, after she had done that, and said to her, "Give me my money now; don't play with my money," and then she stepped back and drew a pistol, and told him that, if he accused her of taking his money, she would blow his brains out. He was asked if he resisted the taking of the money out of his pocket, and he replied: "I did not think she was going to take it, or that she meant any harm after she laughed." And he further said: "He did not try to keep her from taking the money out of his pocket."

On this state of facts the court gave the jury instruction No. 1, which reads as follows:

"If the jury believe from the evidence, to the exclusion of a reasonable doubt, that in this county, and before the finding of the indictment herein, Mary Dawson did unlawfully, and with force and arms, wilfully

and feloniously make an assault upon Louis Curts, and did, in a forcible and violent manner, feloniously put said Curts in fear of bodily harm, and by violence and force and by fear of bodily harm feloniously and against the will and consent of said Curts did take from the person of said Curts \$1.50, or any other sum or value of good or lawful money of the United States, and said defendant did forcibly, and against the will and consent of said Curts, feloniously take, steal, and carry away with the fraudulent intent to convert the same to her own use and to permanently deprive said Curts of his property therein, then the jury should find the accused guilty of robbery, and fix her punishment by confinement in the penitentiary not less than two nor more than ten years, in the discretion of the jury."

The court failed to instruct the jury upon the question of petit larceny. From Curts' evidence it appeared that the accused stealthily placed her hand in his pocket, and took therefrom the money without using force or violence.

In *Commonwealth v. Prewett*, 82 Ky. 240, robbery is defined to be "The felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear." The violence must accompany the act of taking the property. Any resistance after the property has been taken, made in an effort to regain, does not relate back to the act of taking, so as to make it robbery. (*Jones v. Commonwealth*, 24 Ky. Law Rep. 2481, opinion delivered May 20, 1903, 74 S. W. 263.) The fact that she drew a pistol after the taking of the money had been accomplished did not make the act of taking robbery. The prosecutor was not put in fear until after the money had been taken, therefore, if the instruction was correct in other respects, there was no evidence upon which to base that part which authorizes the jury to find the defendant guilty if it believe from the evidence that the accused put the prosecutor in fear. We are of the opinion that the instruction was erroneous, because the Commonwealth wholly failed to prove that any force or violence accompanied the act of taking the money. The prosecutor grabbed her hand and released it without resisting the removal of the money from his pocket. The facts show that the accused was guilty of petit larceny, and the court should have so instructed the jury alone on that question.

The judgment is reversed for proceedings consistent with this opinion.

A Florida case:—In *Colby v. State*, 46 Fla. 112; 35 So. Rep. 189, decided October 20, 1903, the Supreme Court of Florida reversed a conviction for attempt to commit the crime of robbery for a similar reason. The opinion of the court being as follows:—

CARTER, P. J. In January, 1903, plaintiff in error was convicted in the Criminal Court of Record of Duval County upon an information charging him with an attempt to commit the crime of robbery. The information is somewhat inartificial, and its sufficiency was questioned by a motion in arrest of judgment, but the evidence being, in the opinion of the court, wholly insufficient to support the verdict, and not likely to be different upon another trial, and the question of its sufficiency being properly presented

by the assignment of error based upon the ruling denying the motion for a new trial, it is not deemed essential to consider any other question.

From the evidence it appears that the alleged offense was committed on Thanksgiving night during Gala Week on November 27, 1902, in the city of Jacksonville, upon a street so crowded with people that one could not pass without coming in contact with others. Bousman, the prosecuting witness, testified that he and one Davidson were passing along this street, when their attention was attracted to a fight in the street, and a crowd rushing in that direction; that they were borne along with the crowd, and, while being pushed and jostled by the crowd, he felt the defendant's hand in his pocket; that he caught the arm or hand and held it, calling to Davidson, who was several feet away that his pocket was being picked, and to come to his assistance; that Davidson came, and took hold of the defendant, whose hand was still in Bousman's pocket, and delivered him into the custody of a policeman; and that he (Bousman) had \$14.80 in his pocket in paper and silver money. Davidson testified that he was several feet away when Bousman called him, but could see Bousman and the defendant together; looked like they were clinched; and that Bousman had hold of the defendant.

The policeman testified that he heard Bousman calling out from the crowd for a policeman; that he saw Bousman clinched with the defendant, and they appeared to be tussling with each other. This constitutes all the testimony tending to show the defendant guilty of a criminal offense.

The court is of opinion that this testimony does not sustain the conviction had in this case. Had the defendant succeeded in securing the money in Bousman's pocket, the facts would not sustain a conviction for robbery. Our statute (section 2398, Rev. St. 1892) provides that "whoever by force, violence or assault, or putting in fear, feloniously robs, steals and takes from the person of another money or other property which may be the subject of larceny (such robber not being armed with a dangerous weapon) shall be punished," etc. The evidence does not disclose such force, violence, assault, or putting in fear as is contemplated by the statute, but merely an attempt to furtively abstract from the pocket of Bousman money or other valuables supposed to be contained therein. This might constitute an attempt to commit larceny, but not robbery. Where one stealthily filches loose property from the pocket of another, and no more force is used than such as may be necessary to remove the property from the pocket, it is not robbery under the statute, but larceny. *Territory v. McKern*, 2 Idaho, 759, 26 Pac. 123. See, also, the cases cited below.

From the evidence it appears that after Bousman became aware that defendant's hand was in his pocket, he caught the defendant by the arm, calling upon Davidson and a policeman for assistance, and that a struggle ensued, in which the parties clinched. If the defendant struggled or clinched with Bousman in an effort to overpower him for the purpose of enabling him to secure the money in the pocket, there would be such force as the statute contemplates, but the force used merely in an effort to escape from the grasp of Bousman or to avoid arrest would not be such force as is contemplated by the statute. We think the testimony shows clearly that the tussling or clinching spoken of by the witnesses occurred in an

effort to escape from Bousman and to avoid arrest, and not in an effort to secure the property. The testimony does not, therefore, support the conviction for an attempt to rob, and the court below erred in denying the motion for a new trial. *Hanson v. State*, 43 Ohio St. 376, 1 N. E. 136; *Brennon v. State*, 25 Ind. 403; *State v. John*, 50 N. C. 163, 69 Am. Dec. 777; *Commonwealth v. Ordway*, 12 Cush. 270; *Rex v. Gnosil*, 1 Carr. & P. 304; 24 Am. & Eng. Ency. Law, p. 997; 1 McClain, Crim. Law, § 469.

The judgment is reversed, and a new trial awarded.

MAXWELL and COCKRELL, JJ., concur.

TAYLOR, C. J., and HOCKER and SHACKLEFORD, JJ., concur in the opinion.

JACKSON V. STATE.

114 Ga. 826—40 S. E. Rep. 1001.

Decided March 10, 1902.

ROBBERY: *Elements of the crime—Taking without force or intimidation in the presence of the owner—Animo furandi—Evidence, not sufficient to sustain the verdict.*

Though a valuable article in proximity to and under the protection of its owner is constructively upon his person, suddenly snatching it up and carrying it away with intent to steal it is not robbery, when there is no intimidation of the owner for the purpose of getting possession, and no resistance by him to the act of taking. This is none the less true when the article thus taken is a weapon, or capable of being used as such, and the wrongdoer, after taking it, therewith intimidates the owner in order to effect an escape.

(Syllabus by the court.)

Error to Superior Court, Richmond County. Hon. E. L. Brinson, Judge.

Barney Jackson, convicted of robbery, brings error. Reversed.

C. A. Picquet, for the plaintiff in error.

J. S. Reynolds, Solicitor General, for the State.

LUMPKIN, P. J. The evidence in this case warranted a finding of the following facts: Jackson, the plaintiff in error, entered the residence of Cadle, ostensibly for the purpose of purchasing a watch, and examined several which were exhibited to him. It was then discovered by Cadle and his wife that one of the watches was missing. After ascertaining this fact, Cadle, who was a cripple, presented a pistol at Jackson, and Mrs. Cadle began a search of his person for the missing watch. Cadle laid the pistol on the bed, and himself undertook to ascertain if Jackson

had the watch concealed upon his person. Thereupon the latter suddenly picked up the pistol, pointed it at Cadle and his wife, and in this manner effected his escape. They were taken utterly by surprise when Jackson "grabbed the pistol," for "it was done so quick [they] couldn't hardly say nothing," as was stated by Mrs. Cadle in her testimony on the trial. The pistol was not recovered. Jackson was indicted for robbery. The indictment contained two counts. In the first it was charged that the accused did by force and intimidation take from the person of Cadle a described watch, with intent to steal the same. The charge in the second count was that by force and intimidation the accused took from the person of Cadle a certain pistol, with intent to steal the same. The jury returned a verdict finding the accused "guilty of robbery by force, on second count." The case is here upon a bill of exceptions assigning error upon the refusal of the court below to grant a new trial, and turns upon the question whether or not the conviction can lawfully stand upon the state of facts outlined above. We are of the opinion that it cannot.

It is undoubtedly well settled that the meaning of the phrase "from the person of another," embraced in the definition of robbery set forth in section 151 of the Penal Code, is "not that the taking must necessarily be from the actual contact of the body, but, if it is from under the personal protection, that will suffice." See *Clements v. State*, 84 Ga. 660, 665, 11 S. E. 505, 20 Am. St. Rep. 385, and authorities cited. If, therefore, while the pistol was lying on the bed in close proximity to the person of Cadle, he had been put in fear by Jackson, and while under the influence of this fear, and being thus rendered incapable of resisting the taking of the pistol by Jackson, the latter had seized it and carried it away, with intent to steal the same, he would have been guilty of robbery by intimidation; for, in legal contemplation, the pistol, under such circumstances, would by intimidation have been taken from the person of Cadle. The present conviction cannot, however, stand upon this theory. In the first place, it does not appear that Jackson obtained possession of the pistol by intimidating Cadle; and, in the second place, the verdict does not find that Jackson did so. In order, then, to uphold this verdict, it would be necessary for us to decide—as we do not feel authorized to do—that there was testimony showing that Jackson took the pistol *animo furandi* and by force.

Hon. E. L.

or. Reversed.

There was no evidence that he resorted to any force whatever in getting possession of the pistol. It will, of course, be understood that we here use the word "force" in the sense in which it is employed in the definition of robbery. There was no struggle over the pistol between the accused and Cadle. On the contrary, it seems clear that Jackson merely picked up the pistol, deftly and suddenly, and walked off with it; covering his retreat by a show of force in presenting the pistol at Cadle and his wife, with a view to deterring them from attempting to recover the same or to give pursuit. The case therefore falls squarely within the principle laid down in *Spencer v. State*, 106 Ga. 692, 32 S. E. 849, in which it was held that "suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner, or injury to his person, does not constitute robbery." The opinion of Mr. Justice Fish filed in that case presents an elaborate discussion of the question under consideration, and a number of pertinent authorities are cited in support of the ruling therein announced.

Judgment reversed. All the Justices concurring, except LITTLE, J., absent on account of sickness.

BLANTON V. COMMONWEALTH.

22 Ky. Law Rep'r 515—58 S. W. Rep. 422.

Decided September 21, 1900.

ROBBERY—INDICTMENT: *Indictment and proof sufficient.*

1. The indictment charged that the defendant "did unlawfully, willfully, feloniously, and forcibly, and against his will and consent, take and carry away from the person and possession of L. F. De Busk, United States bank notes, silver coin and currency, commonly known as money, the personal property of the said De Busk, and of the value of \$511, with intent to permanently convert same, and deprive the owner thereof." Held to sufficiently charge robbery.
2. Proof, that the accused seized the prosecuting witness, pulling his overcoat open, tearing off the buttons and tearing the button-holes, he, the prosecuting witness, in the meantime endeavoring to free himself. Upon getting free he discovered that his pocket book containing \$511 was gone. Held, sufficient proof of robbery.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Sarah Blanton, convicted of robbery, appeals. Affirmed.

G. W. Muir, Jr., for the appellant.

Robert J. Breckinridge and Morrison Breckinridge, for the Commonwealth.

HOBSON, J. Appellant was indicted in the Fayette Circuit Court for robbery. The first question made on the appeal is the sufficiency of the indictment. It is charged that appellant "did unlawfully, willfully, feloniously, and forcibly, and against his will and consent, take and carry away from the person and possession of L. F. De Busk United States bank notes, silver coin and currency, commonly known as money, the personal property of said De Busk, and of the value of \$511, with intent to permanently convert same, and deprive the owner thereof."

Robbery is the felonious taking of property from the person of another by force. The taking must be by violence, or by putting the owner in fear, but both these circumstances need not concur. *Williams v. Com.* (Ky.) 50 S. W. 240. Under the rule announced in this case and the authorities there cited, the indictment is sufficient. It was held in the same case that to snatch a pocketbook forcibly from another's hand was robbery; and in *Snyder v. Com.* (Ky.) 55 S. W. 679, it was held that if the victim is being pushed or shoved about by the pickpocket or his associates, for the purpose of diverting his attention, and the crime is then accomplished, it is robbery, even if the victim is at the time unaware of his loss. See, also, *Davis v. Com.* (Ky.) 54 S. W. 959.

The proof for the Commonwealth is to the effect that appellant grabbed hold of De Busk, pulled open his overcoat, tore the button holes and buttons off, and also pulled his vest open. They scuffled while he was trying to get loose, and soon after getting loose he found that his pocketbook, which contained \$511, had been stolen from his pants' pocket. This proof, which the jury seemed to have believed true, was sufficient to sustain a conviction for robbery. "Thus, where the prisoner took hold of the prosecutor's cravat, and pressed him against a wall, at the same time taking his watch without his knowledge, this was held to be robbery." "And where several combine to push one rudely about, and while his attention is thus drawn away take

his money, it is robbery." 1 Rob. Cr. Law, § 290. Judgment affirmed.

NOTE (By J. F. G.).—While the facts stated in this case might constitute robbery, several of the cases cited to sustain the decision seem to push the dividing line between robbery and larceny into the domain of the latter offense. Diverting the attention of the victim, by crowding him, or by shoving in a crowd, brings such case very close to cases of larceny by slight of hand. (*Colby v. State*, note, ante, 584.) The above case reminds us of a Chicago court room story:—

When the late Judge Grinnell held his first session of court, and had passed upon a number of motions, etc., he asked General Stiles, a noted lawyer of that time, what he thought of his decisions. It is claimed that General Stiles answered: "Your decisions were right, but d— your reasons." (It may be just to say, that General Stiles probably meant rather to criticise the habit of giving unnecessary reasons, than to attack the reasons from point of merit.)

DORSEY V. STATE.

34 Ala. 553.—33 So. Rep. 350.

Decided June 19, 1902.

ROBBERY—INDICTMENT—PROPERTY OF MINOR—PRACTICE: *Wages paid by the father—Two counts—Instructions.*

1. Defects in the transcript of record are cured, when a corrected transcript is sent up upon *certiorari*.
2. Money paid as wages by a father to his minor son thereby becomes the property of the son and may be so described in an indictment for robbery of the son.
3. The first count of the indictment, charged that the money of George Mc Namara, the son, was forcibly taken from his person, while the second count laid the ownership in the father, the proof showing that the money was paid by the father to the son as wages. Held,—that the second count was not sustained; but that the court was not bound to instruct the jury to return a verdict of not guilty on that count.

Appeal from Criminal Court, Jefferson County: Hon. D. A. Greene, Judge.

Will Dorsey, convicted of robbery, appeals. Affirmed.

Bowman, Harsh & Beddow, for the appellant.

Charles G. Brown, Attorney General, for the State.

MCCLELLAN, C. J. As it appeared originally in the transcript, the first count of the indictment employed the word "felinously,"

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where the word "feloniously" should have been used, and in the second count the word "feloniously" was omitted. The copy of the indictment sent up in response to the writ of *certiorari*, however, shows that it employs the word "feloniously" in each count. So that the brief of counsel attacking the indictment as first certified to us has now no pertinency.

The indictment is as follows: "The grand jury of said county charge that before the finding of this indictment, and before the 17th day of February, 1898, Will Dorsey, Sidney Walker, and Jim Kelly feloniously took seven silver dollars and one silver half dollar, of the silver coin of the United States of America, the property of George McNamara, from his person, or in his presence, and against his will, by violence to his person, or by putting him in such fear as to unwillingly part with the same. The grand jury of said county further charge that before the finding of this indictment Will Dorsey, Sidney Walker, and Jim Kelly, feloniously took seven silver dollars and one silver half dollar, of the silver coin of the United States of America, the property of Dave McNamara, from the person of George McNamara, or in the presence of said George McNamara, and against his will, by violence to his person, or by putting him in such fear as to unwillingly part with the same; against the peace and dignity of the State of Alabama." The evidence showed without conflict that George McNamara was the minor son (14 years of age) of Dave McNamara; that he lived with his father, and was supported by the father as a member of the family; that the boy worked for his father, the latter agreeing to pay him \$7.50 per month for his services; that the father had just paid the son a month's wage, according to this understanding; and that it was this money that was taken from the boy. On this evidence the defendant requested the following charges: "(1) If the jury believe the evidence, they must find the defendant not guilty under the second count of the indictment. (2) If the jury believe the evidence, they must find the defendant not guilty under the first count of the indictment. (3) If the jury believe the evidence, they must find the defendant not guilty. (4) The court charges the jury that, if George McNamara was under the age of twenty-one years, that all personal property claimed by said George McNamara was the property of the father; and, unless the evidence shows that George Mc-

Namara was over the age of twenty-one years, or had been emancipated by his father, or had his disabilities of non-age removed, then in that event the jury cannot convict the defendant under the first count of the indictment." The father being entitled to the services of his unemancipated minor son, the payment of wages by him to the son is, of course, in the nature of a gift; but the executed gift (the purpose to give having been carried out by delivery) by the father to the son vested the property—the money—absolutely in the son for all the purposes of this case, and left no property or possession in or of the money in the father. *Stovall v. Johnson*, 17 Ala. 14. The case stands upon a different footing from that of provision by the father of clothing and the like for his minor children under the duty the law imposes on him in that connection. Such provision, though a gift in a sense, is made for the father's own purposes, and for uses it is his duty to conserve, and in respect of which he has such interest and control as leaves in him property in the things so provided. And in these cases on an indictment charging larceny or other offense requiring the averment of ownership, property may well be laid in the father, and probably also in the child who has the possession and use and right of use. 2 Bish. Cr. Proc. § 721. But on the evidence here the gift was absolute. It was not made in discharge of the father's duty to support and maintain the son. The father had no interest in the uses the son should make of the money, and no control in respect thereof. He parted with all his interest in the thing given, and the son acquired the full rights of ownership in and to it. Upon these considerations we are come to the opinion that a conviction could no more be had on the second count of the indictment than had Dave McNamara, in whom the property is therein laid, not been the father of George McNamara, from whom the money was taken. There being this failure to prove the averment of ownership as made in the second count,—a variance, indeed, between the allegation and the proof of ownership,—the defendant was entitled to have the jury instructed that they could not convict him under this count. But it by no means follows that he was entitled to have them instructed "to find him not guilty under the second count," which was the instruction he in fact requested. In the first place it would seem that the charge asked had a tendency to mislead the jury to the conclusion that because of this second

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count they should acquit the defendant. But the charge was objectionable aside from that consideration. When there is a count in an indictment under which, on the evidence, the jury have a right to convict, it cannot be said to be their duty to find him not guilty under any other count; for, if they reach the conclusion that the defendant is guilty under a count which is supported by the evidence, they may stop there, without considering other counts at all, and, of course, without finding the defendant to be not guilty under another count, which the evidence fails to support. And in such case,—which is the case here,—while a charge that the defendant cannot be convicted under the count as to which the proof has failed should be given upon request, the court is under no duty, and, indeed, it is not authorized, to instruct the jury that, if they believe the evidence, they should find the defendant not guilty under such count. Upon these considerations we hold that the court properly refused charge 1 requested by the defendant. A like ruling has been made upon like considerations in civil cases. *Railroad Co. v. George*, 94 Ala. 201, 10 South. 145; *Railroad Co. v. Sandlin*, 125 Ala. 585, 28 South. 40.

The evidence was without conflict, as we have seen, in proof of ownership in George McNamara as laid in the first count. It also supported the averments of that count as to the guilt of the defendant. It follows that charges 2, 3, and 4 were also properly refused.

Affirmed.

STATE v. MORLEDGE.

164 Mo. 522—65 S. W. Rep. 226.

Decided Nov. 12, 1901.

ROBBERY: *Ownership of the goods taken should not be laid in an employe of the owner—Defense of insanity entirely failing, instructions on that phase of the defense unnecessary.*

1. Where the indictment charged the money stolen by defendant in robbing a saloon, to belong to the bartender, a mere employe, whereas in fact it belonged to the proprietor of the place, it is error to instruct the jury that the ownership of the money was, for the purposes of the trial, properly charged to be in the employe. The indictment in such case must charge the money to be the property of its actual owner, and not of the servant. (Following *State v. Lawler*, 130 Mo. 366.)

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2. Where the evidence is entirely inadequate to establish the defense of insanity, it is not error to withdraw such issue from the jury.

BURGESS, J. Defendant was convicted in the Criminal Court of Jackson County of robbery in the first degree, and his punishment fixed at 25 years' imprisonment in the penitentiary. He appeals.

It appears from the record that on the night of the 21st of January, 1890, one John Resmussen was in charge, as night bartender, of a saloon on West Twelfth street, Kansas City, Mo., which belonged to Schattner Bros., and that about half past 4 o'clock a. m. defendant entered the saloon, having on a short white coat, a soft white hat and a handkerchief tied over his face, and a pistol in each hand. He commanded Resmussen and another man, who was then in the saloon, and the porter, to throw up their hands; and, they having complied with his command, he went behind the bar, opened the drawer of the cash register, and took the money, amounting to over \$20, therefrom. Immediately thereafter a policeman was informed of the robbery, and apprehended defendant about 2½ blocks from where it occurred. When the officer stopped him, defendant had his hands in his overcoat pocket, and a revolver in each hand. He took defendant back to the saloon. At first he was not recognized, but when the officers pulled the white hat from the prisoner's pocket, together with the money taken, and Resmussen's revolver, and found that he had three handkerchiefs around his neck, he said he committed the robbery because he needed the money. On being taken to the station the defendant first gave the name of Morley, but later, on being recognized by some officer, he gave his right name. While at the station he sent for James A. Einley, who at the trial testified as a witness for defendant. On his cross-examination he said that the prisoner told him in the conversation he had at the station that he robbed Schattner's, McClintock's, and a little restaurant between Twelfth and Thirteenth streets; that he got \$145 from McClintock's, 20-odd dollars from Schattner's, and \$6.65 from the other place; and that he robbed these places one right after the other.

The indictment charges that the money and pistol taken by defendant were the property of John Resmussen, while the evidence showed that the money belonged to Schattner Bros.

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Over the objection and exception of defendant, the court, at the instance of the State, instructed the jury as follows:

"(1) The court instructs the jury that if they find and believe from the evidence that the defendant, C. E. Morledge, did, at the County of Jackson and State of Missouri, at any time within three (3) years next before the 25th day of January, 1900, unlawfully and feloniously make an assault upon the witness John Resmussen, and did, in his presence and against the will of the witness John Resmussen, and without any honest claim to the same, with the felonious intent to deprive the owner of his property therein, and by putting him in fear of immediate injury to his person, unlawfully and feloniously take from the presence and custody of the witness John Resmussen any of the property mentioned in the indictment, the property of the witness John Resmussen, and that said property was of any value whatever, you will find the defendant guilty, and assess his punishment in the State Penitentiary for any term of years not less than five years. 'Feloniously,' as used in these instructions, means wickedly and against the admonition of the law,—unlawfully.

"(2) The court instructs the jury that the ownership of the property mentioned in the indictment, for the purpose of this trial, is properly laid in the witness John Resmussen."

Defendant asked the following instruction, which was refused, and he duly excepted:

"If the jury believe from the evidence that the money and revolver described in the indictment were the property of the Schattner Bros., and not the property of Resmussen, the person described as the owner in the indictment, and that said John Resmussen was simply the bartender, employe and servant of said Schattner Bros., then their verdict must be for the defendant, and you will find him not guilty as charged in the indictment. In order to hold the defendant under the indictment, the jury must find that the witness Resmussen owned the property alleged to have been stolen, or had an interest in it."

It is insisted by defendant that as the offense charged is robbery in the first degree, the proof must show that the money or property was taken from the possession or in the presence of the real owner, and as it appears from the evidence in this case that Resmussen was not the owner, but only a servant or employe left temporarily in the possession of the property, he could not

be convicted under this indictment. The question here presented underwent thorough consideration in the recent case of *State v. Lawler*, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575, and in an able review of the authorities by Sherwood, J., the rule was announced that the test is that, if the party alleged in the indictment to be the owner of the property have such a special interest in it, by lien or otherwise, as would enable him to maintain an action for its possession or injury thereto against any person other than the true owner, prosecution will lie in the name of such alleged owner; otherwise not,—citing *Com. v. Morse*, 14 Mass. 217; *Ludden v. Leavitt*, 9 Mass. 104, 6 Am. Dec. 45; *Warren v. Leland*, 9 Mass. 265; *Dillenback v. Jerome*, 7 Cow. 294; 2 Bish. Cr. Proc. § 722.

Now, it is perfectly clear that Resmussen was the mere servant of Schattner Bros., and had the money in his possession as such, and wholly without any personal interest in it which would have enabled him to maintain an action therefor, or for any injury to it. Its possession was that of his employers, Schattner Bros., and the indictment should have so shown. The State cites many authorities which seem to hold to a contrary view, but we are entirely satisfied with our own ruling, believing it to be sustained by both reason and authority, and must decline to review those relied upon by defendant. It follows that the court erred in giving the instructions on the part of the State and in refusing to give the instruction asked for by defendant.

There was no error in withdrawing from the consideration of the jury the evidence of defendant's insanity, even if it be entitled to be called such, because it was entirely inadequate to establish such defense.

For these considerations, we reverse the judgment and remand the cause, in order that the Prosecuting Attorney of the county may take such steps in the case as he may think comport with the best interests of the public. All concur.

STATE v. ADAIR.

160 Mo. 391—61 S. W. Rep. 187.

Decided February 26, 1901.

ROBBERY—APPROVED INSTRUCTIONS: *Instructions as to elements of the crime—Defendant's interest as a witness—Province of the jury to pass on the weight of the testimony of other witnesses—Effect of false statements by a witness—Reasonable doubt—Alibi.*

1. An unlawful and felonious assault with intent to deprive the person assaulted of his property, made without any honest claim to the property, and the unlawful taking of property from him by force and violence and against his will, constitutes the crime of robbery in the first degree.
2. It is not error to instruct, in a prosecution for robbery, that the defendant is a competent witness in his own behalf, but that his interest in the result of the case may be considered in determining his credibility.
3. It is not error to instruct in a prosecution for robbery, that a reasonable doubt sufficient to warrant an acquittal, must be a substantial doubt of defendant's guilt, with a view to all the evidence, and not a mere possibility of the defendant's innocence.
4. It is not error to instruct, in a prosecution for robbery, that, if there is any evidence which raises a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, he must be acquitted.
5. It is not error to instruct, in a prosecution for robbery, that the jury are the sole judges of the credibility of the witnesses and the value of their testimony, but that in determining the credit to be given a witness, his conduct on the stand, interest in the result of the trial, feeling towards the accused, or the injured person, the improbability of his statements, his opportunity for observation and knowledge, and his inclination to speak truthfully, should be considered in connection with all the other facts given in evidence.
6. It is not error to instruct, in a criminal case, that, if the jury concludes that a witness has testified falsely to a material fact, his entire testimony may be disregarded.
7. Where there is sufficient evidence to convict the defendant in a prosecution for robbery, the question of the credibility of the evidence affirming or denying his presence when the crime occurred is for the jury.

Appeal from Criminal Court, Jackson County; Hon. John W. Wofford, Judge.

James Adair, convicted of robbery, appeals. Affirmed.

James M. Chaney, Jr., for the appellant.

Edward C. Crow, Attorney General and Sam B. Jeffries, Assistant Attorney General, for the State.

SHERWOOD, P. J. The verdict of the jury found defendant

guilty of robbery in the first degree, and assessed his punishment at five years in the penitentiary. The instructions given by the court were as follows:

No. 1: "The court instructs the jury that if they find and believe from the evidence that the defendant, James Adair, at the county of Jackson and State of Missouri, at any time within three years next before the 17th day of April, 1900, did unlawfully and feloniously make an assault upon the witness, Bessie Proctor, and did by force and violence to her person, in her presence, and against her will, and without any honest claim to the same, with the felonious intent to deprive the owner of her property therein, and convert the same to his own use, unlawfully and feloniously take from the witness, Bessie Proctor, any of the property mentioned in the indictment, of any value whatever, the property of the witness, Bessie Proctor, you will find the defendant guilty of robbery in the first degree, and assess his punishment at imprisonment in the State penitentiary for any time not less than five years. 'Feloniously,' as used in these instructions, means wickedly, and against the admonition of the law; unlawfully."

No. 2: "The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict, but in determining what weight and credibility you will give to his testimony in making up your verdict you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on trial, testifying in his own behalf."

No. 3: "The court instructs the jury that before they can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt. Such doubt, to authorize an acquittal upon reasonable doubt, must be a substantial doubt of the defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence."

No. 4: "The court instructs the jury that, if there is any evidence before you that raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, you will acquit the defendant."

No. 5: "The jury are the sole judges of the credibility of the witnesses, and of the weight and value to be given to their testimony."

"In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, the motives actuating the witness in testifying, the witness' relation to or feeling for or against the defendant or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper.

"If, upon a consideration of all the evidence, you conclude that any witness has sworn willfully false as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony."

There was sufficient evidence in the case to convict defendant, and it belonged exclusively to the jury to say whether they would believe the evidence given on behalf of the State, which went to show defendant present where the crime occurred, or that on the part of defendant, which went to show him absent from the scene of the robbery, at the time of its perpetration. The third instruction has frequently been given in form and substance in prior cases in this court, and we reaffirm its correctness. *State v. Nuclein*, 25 Mo. 111; *State v. Blunt*, 91 Mo. 503, 4 S. W. 394; *State v. Bobbst*, 131 Mo., loc. cit. 339, 32 S. W. 1149; *State v. Robinson*, 117 Mo., loc. cit. 661, 23 S. W. 1066; *State v. Sacre*, 141 Mo. 64, 41 S. W. 905; *State v. Knock*, 142 Mo., loc. cit. 524, 44 S. W. 235; *State v. Holloway*, 156 Mo., loc. cit. 227, 228, 56 S. W. 734.

And the same may be said of instruction No. 4 which the court gave, touching the presence of the defendant at the scene and time the crime took place. This, being all that was necessary to cover the case, rendered unnecessary the giving of defendant's first instruction, on the correctness of which it is, therefore, wholly useless to pass.

The other instructions are formulated after the fashion of others that have often received our indorsement.

Finding no reversible error in the record, judgment affirmed.
All concur.

STATE V. ROWLAND.

174 Mo. 373—74 S. W. Rep. 622.

Decided May 19, 1903.

ROBBERY: *When insufficiency of evidence is cause for reversal of conviction—Prosecuting witness denies that accused robbed him—Instruction.*

1. It is only when there is no substantial evidence to support the verdict that the Appellate Court will interfere on the ground of the insufficiency of the evidence. And in this case it is held that although the person assaulted and robbed testified that defendant did not rob him, yet as there was substantial evidence to support the jury's finding that he did, the verdict will be permitted to stand.
2. It is unnecessary to use the word "felonious" in the instructions on the part of the State in a robbery case or to define it.

Appeal from Circuit Court, Macon County; Hon. Nat M. Shelton, Judge.

William Rowland convicted of robbery, appeals. Affirmed.

Jno. A. White and *Nat M. Lacy*, for the appellant.

Edward C. Crow, Attorney General, and *C. D. Corum*, for the State.

BURGESS, J. Under an indictment preferred by the grand jury of Macon County against defendant charging him with having robbed one Richard Edwards of \$35 in money, defendant was convicted, and his punishment fixed at five years' imprisonment in the penitentiary. Defendant appeals.

The facts are about as follows: On the 12th day of August, 1901, the defendant and one Richard Edwards were in Macon City, Mo., and were drinking together quite freely. About dark that evening Edwards informed the defendant, Rowland, of his purpose to take a train that evening for the town of Excello, and the two started toward the depot; Edwards for the purpose of taking the train, and defendant to accompany him to the depot.

When Edwards first arrived at Macon City on the day aforesaid from his daughter's in the country he had \$30 in his possession, and thereafter received an additional sum of \$7.50. On the

way to the depot he and defendant concluded to take a parting drink, when Edwards handed to the defendant 25 cents with which to purchase it. Defendant then went to a near-by saloon, and procured a bottle of beer for that sum. Upon his return the two sat down to drink, and during the time which was consumed in drinking the beer another party came up, and remarked "that was not the right kind of a place to be drinking, and, if we didn't move on we would be run in." Edwards then got up and started, when the defendant, Rowland, said, "Go with me; that is not the way to the depot." The other gentleman then said, "Yes, go with him" (referring to the defendant). Edwards then started off with defendant. It seems that the prosecuting witness walked more slowly than the defendant, and traveled behind. When the men had reached a street light they were pursued by a third person, and an altercation then occurred. The third person said, "I guess I will run him in," and Edwards replied that he had committed no offense for which he ought to be arrested. Thereupon the defendant or the third person, it does not clearly appear which, struck Edwards with some instrument above the eye, knocking him down. He was then picked up by the two men, and carried a short distance away. Here he was found a few minutes afterwards in an unconscious condition, and it was observed that his pockets were turned wrong side out. The State further offered in evidence the statement made by the defendant to the police officers that he did not accompany Edwards toward the depot, but left him at the point at which they drank beer. On the following day, however, he did admit to several persons that he was in company with him at the time he was assaulted, and stated that Edwards was assaulted by some one who pretended to be an officer, and that he (the defendant) ran away immediately on the approach of the person whom he thought to be an officer. The evidence further showed that the defendant observed to Edwards at the time that they were drinking the beer that he would probably be arrested, and that he would better place some money in his (defendant's) pocket in order that the defendant might pay the fine of Edwards in the event that he should be incarcerated. It was also in evidence that some person said to the pretending officer, "I will give you a couple of dollars to let him go." And there was one witness on behalf of the State, who testified that he heard these men talking at the point where Edwards was as-

saulted, and that he recognized the voice of the defendant. It was also in evidence on behalf of the State that, after the defendant and Edwards were confined in jail, the defendant told him that the parents of the man who assaulted and robbed him were well to do, and that, in the event that the defendant should be liberated from prison, he could arrange it so that the person who assaulted the defendant would return the money procured, and pay the defendant's fine.

Testifying on his own behalf, the defendant admitted that he had at first denied having any knowledge of the assault that was made on Edwards. He further testified that he did accompany Edwards in the direction of the depot, and that when two men approached rapidly from the rear he left Edwards, and ran away. He denied having committed the robbery, or having any knowledge of its commission.

Edwards also testified that defendant had nothing to do with robbing him.

At the close of the State's evidence defendant asked the Court to instruct the jury "that under the law and the evidence you must return a verdict for defendant." This the Court declined to do, and in so doing defendant insists committed error. The contention is that there was no evidence to authorize the verdict, and that the verdict of the jury is against the law and the evidence of the case.

Much stress is placed upon the fact that Edwards testified that defendant did not have anything to do with robbing him; but this statement was not conclusive upon the State, under the circumstances, for the evidence tends strongly to show to the contrary, and that Edwards was robbed after he was knocked down and was unconscious, and did not in fact know certainly whether defendant was one of the parties who robbed him or not. That there were two of them concerned in the robbery is clear, and that defendant was one of them we are fully satisfied. His taking Edwards a different and further route to the depot than the one that he started upon, his knowledge that he had money upon his person, the assault upon Edwards alone while defendant was not molested, and his statements after they were both confined in the jail, point very strongly to his guilt—at least tend to show it; and its weight was for the consideration of the jury. It is only in case there is no substantial evidence to support the verdict that

this court will interfere, and the facts disclosed by the record in this case do not bring it within that rule.

There is nothing disclosed by record tending to show that the jury were actuated by bias or prejudice against the defendant in rendering their verdict.

Defendant insists that the court erred in giving the first instruction on the part of the State, because there was no evidence upon which to predicate it; but this position we think untenable, as, in our opinion, there was ample evidence to justify it.

It was unnecessary to use the word "felonious" in the instructions on the part of the State, or to define it. *State v. Woodward*, 131 Mo. 369, 33 S. W. 14; *State v. Barton*, 142 Mo. 450, 44 S. W. 239; *State v. Miller*, 159 Mo. 113, 60 S. W. 67.

Finding no reversible error in the record, we affirm the judgment. All of this division concur.

STATE V. SPRAY.

174 Mo. 569—74 S. W. Rep. 846.

Decided May 19, 1903.

ROBBERY—OTHER CRIMES: *Instructions—Improper evidence as to another, but disconnected, robbery by the accused—The intent is proven from the facts in the case and not inferred from other similar crimes—Proof of other crimes not evidence of corroboration—Review of the subject as to when proof of other crimes, do or do not, bear on the issue on trial.*

1. An instruction on robbery, which fully and correctly states all the elements of robbery, is not error, because it fails to state that the property was taken and carried away "with fraudulent and felonious intent." The word "felonious" or "feloniously" or "fraudulently" is not entitled to any place in the instruction.
2. Evidence of another separate and distinct robbery committed by the same defendant upon another person in the same neighborhood, but six or seven blocks distant, in much the same way, and of the same kind of goods, and about the same time, is not admissible in evidence against one who is being tried for robbing a pedestrian on a street in a city about midnight, by holding a pistol in his face. Such is not an exception to the rule, that evidence of matters other than those charged in the indictment are inadmissible. It is only when the testimony as to the separate offense will have some tendency to prove the charge laid in the indictment that it is admissible; it must, therefore, have some logical connection with the crime charged.
3. Proof of another robbery is not admissible in a robbery case for the purpose of showing intent. The facts constituting the offense are

sufficient evidence of intent in larceny cases. The act itself carries the intent with it.

4. The fact that defendant committed another robbery very near the same time does not tend to prove that he committed the robbery for which he is being tried. Evidence of the crime is not, therefore, admissible in evidence as corroboration.

Appeal from St. Louis Circuit Court; Hon. Walter B. Douglas, Judge.

Joseph Spray convicted of robbery, appeals. Reversed.

John A. Gernex, for the appellant.

Edward C. Crow, Attorney General, *Sam B. Jeffries*, Assistant Attorney General, and *Jerry M. Jeffries*, for the State.

Fox, J. The indictment in this case was returned into court May 9, 1902, and by it the defendant is charged with being a habitual criminal and with robbery. On trial he was found guilty of robbery, and his punishment fixed at 15 years' imprisonment in the penitentiary. After an unsuccessful motion for a new trial, he has appealed to this court.

On the night of March 26th, at about 10 o'clock in the evening, George A. Mellies, a practicing physician in St. Louis, Mo., was held up and robbed of \$49 in money, a gold-filled watch, and a bunch of keys; the watch was worth about \$25.

The doctor tells the story of the robbery as follows: "As I was nearing the corner of Seventeenth (that is, as I came to the corner of Seventeenth and Madison streets; that is, the northwest corner), a man stepped up in front of me, as I come to the corner of the pavement where Madison street and Seventeenth street meet; and, when I saw the man was standing in front of me, I looked up, and with that I saw a revolver presented to my face, and he said, 'Throw up your hands;' with that, I said, 'What do you mean?' and stepped back a step; and he said, 'I mean business, no monkeying. I want what you have. If you make any move, I will blow your brains out;,' and with that he changed his revolver from his right hand to his left, and proceeded to go through my pockets, take out my money I had in my pocketbook, and then took the money I had in my vest pocket, and then the watch, and then went in the other pocket and took the bunch of keys. After he had done that, he says, 'Now, don't you follow me.' I walked over Seventeenth street to Cass, and telephoned down to the police station in regard to the matter."

That night about 12 o'clock two police officers arrested defendant at his home. He was taken to the police station, where he was identified by the prosecuting witness.

Notwithstanding the objection and exception of counsel for defendant, the court permitted witness Arthur Damschroeder to testify not only as to seeing the defendant some five, six, or seven blocks from the place of the commission of the offense charged, but also that defendant assaulted and robbed him. The witness fixes the time of this second robbery within a few minutes of the time fixed by the prosecuting witness as to the first offense.

Police officers were also introduced; testifying as to conversations with defendant in respect to the robbery, and the identification of defendant as made by the prosecuting witness.

Numerous witnesses were introduced by defendant, tending to establish the defense of an alibi.

We will omit from this statement the testimony upon the charge, as contained in the indictment, of being a habitual criminal, as the jury failed to find the defendant guilty of that charge.

The jury returned a verdict of guilty as to the charge of robbery, and fixed the defendant's punishment at imprisonment in the penitentiary for 15 years. From this judgment of conviction he brings this cause to this court for review, by appeal.

As the defendant was only convicted of the charge of robbery, as contained in the indictment, there is no necessity of discussing the errors complained of which are alone applicable to the charge of being an habitual criminal.

The errors complained of in respect to the offense of which defendant was convicted are:

First, that instruction No. 1, as given by the court, is erroneous, in its failure to properly define "robbery" and "larceny."

Second, that instruction No. 2 was not warranted.

Third, that instruction No. 8 was not authorized, because based upon incompetent testimony.

Fourth, that the court erred in the admission of the testimony of witness Arthur Damschroeder as to the commission of a separate and independent offense.

Instruction No. 1, of which appellant complains, is as follows:

"If, upon consideration of all the evidence in the light of these instructions, you believe and find from the evidence that at the

city of St. Louis and state of Missouri, on or about the 26th day of March, 1902, or at any time within three years next before the finding of the indictment herein, the defendant, Joseph Spray, did assault the prosecuting witness, George A. Mellies, and by violence to his person, or by putting him in fear of immediate injury to his person, did, against his will, take from his person one bunch of keys, one gold-filled watch, one fob, and forty-nine dollars in money, or some part of said property or money, with the intent at the time to wrongfully take and carry away and to fraudulently convert the same to his own use, and permanently deprive the owner thereof, without his consent, and that the property so taken was the property of said George A. Mellies, and was of any value, then you should find the defendant guilty of robbery in the first degree, as charged in the indictment."

The complaint urged against this instruction is that it "fails to state the property was taken and carried away with fraudulent and felonious intent." This same complaint has been frequently urged in this court.

In the case of *State v. Scott*, 109 Mo. 226, 19 S. W. 89, it is clearly announced that the word "felonious" is merely descriptive of the grade of the offense, rather than of the criminal act which constitutes the offense, and ordinarily has no place in an instruction. In the case of *State v. Johnson*, 111 Mo. 578, 20 S. W. 302, MacFarlane, J., fully discusses this question, and reviews all the authorities. This was a case of robbery. He says:

"It is particularly objected that the word 'feloniously' is used in the instruction to express the intent with which the act must have been done in order to make it criminal, and the word, being technical, should have been properly defined. It was said by Judge Henry in *State v. Snell*, 78 Mo. 242, in speaking of this word and the necessity of defining it, that, 'it is employed to classify offenses, but is not a distinct element of a crime. If the facts proved establish a felony, then the crime was committed feloniously. If they establish a misdemeanor, the offense was not feloniously done. A correct definition of the word could not have aided the jury in their deliberations.' In *State v. Scott*, 109 Mo. 226, 19 S. W. 89, it is said: The word 'felonious' is descriptive of the grade of the offense, rather than of the criminal act which constitutes the offense, and ordinarily has no place in an instruction. Robbery is made a felony by statute, and the act of robbing

is felonious, and all robbery is feloniously done. The use of the word in the instruction threw no light whatever upon the transaction. A correct definition could not have aided the jury in its deliberations, nor could the failure to define it 'have prejudiced defendant's case, or been an obstacle in the way of the jury to a proper verdict on the law and facts,' as was said in *State v. Snell*, *supra*. We do not wish to be understood as saying or implying that the jury should not have been instructed as to what facts, if proven, would have established a felonious intent; that is, the intent to commit the robbery." It will be noted that the instruction complained of requires the jury to find that the defendant took the property "with the intent at the time to wrongfully take and carry away and to fraudulently convert the same to his own use, and permanently deprive the owner thereof, without his consent." This declaration fully covered every element of the offense of larceny. The elements of robbery preceded this in the instruction, and were in due form. The term "felonious" or "feloniously" was not entitled to any place in the instruction. It was not necessary, and would furnish no aid to the jury in reaching a verdict.

This contention must be ruled against the appellant.

As to instruction No. 2, it is sufficient to say that this instruction was applicable to the charge in the indictment of being a habitual criminal; the jury found the facts, as applicable to this instruction, against the State; hence it is unnecessary for this court to discuss it.

This leads us to the important and vital contention in this case—the complaint that the trial court committed error in the admission of the testimony of witness Arthur Damschroeder.

As instruction No. 8, complained of, is based upon this witness' testimony, it follows that the conclusion reached upon the admissibility of this testimony will determine the correctness or incorrectness of this instruction. Hence it will only be necessary to treat of the action of the trial court in admitting the testimony.

The record of the testimony in this cause discloses that the prosecuting witness detailed with particularity the robbery as charged in the indictment, and that he identified the defendant as the perpetrator of the offense. Following his testimony, witness Arthur Damschroeder was introduced, and he, over the

objections of the defendant, details with equal particularity the perpetration of a robbery upon the witness. The location or place of the assault and robbery of Damschroeder is, according to the record, five or six blocks from the first—a distance of a half or three-quarters of a mile. The time as fixed between the two offenses is very short. An examination of this record, while the two offenses were in the same locality, and were closely followed in point of time, discloses that they were not so closely allied as to constitute one transaction, but were separate and independent offenses. This was the view taken of it by the trial court, for the instruction given proceeds upon the theory that the last robbery was a separate and distinct crime, and he admitted the testimony on the ground that the jury had the right to consider it in determining the intent of the defendant in the commission of the offense charged, and in corroboration of the prosecuting witness. We take it that it must be conceded from the record in this cause that the robbery as testified to by Damschroeder was a separate and distinct offense, entirely disconnected with the offense with which the defendant was charged; and this confronts us with the simple but important question, does this testimony of a separate offense fall within the exception of the general rule?

The general rule as to the admission of testimony of the commission of offenses other than the one charged is that it is inadmissible. This rule is very tersely stated by Mr. Bishop in his *New Criminal Procedure*. He says:

"The State cannot prove against a defendant any crime not alleged, either as foundation for a separate punishment, or as aiding the proofs that he is guilty of the one charged, even though he has put his character in issue."

And this announcement by Mr. Bishop is very forcibly and appropriately emphasized in the recent case of *People v. Molineux* (N. Y.) 61 N. E. 293. The court says: "This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of *Magna Charta*. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected

by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

In the case of *State v. Goetz and Martin*, 34 Mo. 85, we find an able and exhaustive discussion of this question. It is so fully, fairly, and ably discussed, and so nearly approaches the facts in this case, that it has specially, in the treatment of this contention, attracted our attention. The court, speaking through Bay, J., said:

"Against the objections of the defendants, the State gave evidence tending to prove that on the same day, and near the same hour, and at stores in the vicinity of Jaccard's, the defendants had feloniously taken other articles from other persons. The admission of this evidence is the principal ground of error relied upon for a reversal of the judgment. As a general rule, evidence of matters other than those charged in the indictment is inadmissible; and the reason of the rule is obvious enough, for, when a party is charged with a particular offense, he has notice to be prepared to defend himself, but he cannot be prepared to defend himself against a charge of which he has had no notice, and which is exhibited against him for the first time while on trial for another and distinct offense. But this rule is subject to various exceptions, rendered necessary by the difficulty which the prosecution labors under to establish the intent with which the act is done. Thus, upon an indictment for uttering a forged bank note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to show his knowledge of the forgery. If such evidence was inadmissible, it would be impossible, in ninety-nine cases out of a hundred, to fix a criminal intent upon the offender. So, on an indictment against a receiver for receiving several stolen articles, if it be proved that they were received at several times, the prosecutor may be put to his election, yet evidence may be given of all the receipts for the purpose of proving guilty knowledge. 2 Russ. on Crimes, 777. So, in a case where the prisoner was indicted for forgery, and uttering with guilty knowledge, a bill of exchange purporting to be drawn upon a certain banking house, it was held that other forged bills upon the same house, which were found upon the prisoner at the time of his arrest, were admissible as evidence of guilty knowledge. *Spencer v. Commonwealth*, 2 Leigh, 751. On an indictment for an

assault with an intent to commit a rape, evidence of previous assaults on the prosecutrix are admissible to show the intent with which the assault in question was committed. *Williams v. The State*, 8 Humph. 585. So, on an indictment for administering sulphuric acid to horses with intent to kill them, administering at different times was permitted to be shown in order to demonstrate the intent. *Rex v. Mogg*, 4 Carr & Payne, 364. Upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, Mr. Russell says proof may be given that the prisoner at another time intentionally shot at the same person. Various other cases might be referred to, in which evidence of other offenses than that charged in the indictment has been admitted to prove intent, but they fall within some of the exceptions to the general rule above stated; but we have been unable to find any reported case in which, upon a trial for larceny, evidence of another and distinct larceny was admitted to establish the one charged in the indictment. Upon the contrary, we have found cases in which it was held that such evidence was inadmissible, unless it should be shown that some connection existed between the two felonies.

In *Regina v. Oddy*, 6 Brit. Crim. Cases, 266, cited by the prisoner's counsel in this case, it was holden that on the trial of an indictment containing counts for stealing and for receiving the property of A, knowing it to be stolen, evidence of the possession by the prisoner of other property stolen from other persons at other times was not admissible to prove either the stealing or the receiving.

In *Barton v. State*, 18 Ohio, 221, the defendant was tried upon an indictment for the larceny of a mare and gelding and a two-horse buggy wagon. On the trial it was proved that the defendant hired the property from Taylor & Adams for the alleged purpose of going to a town called Avon, a distance of about thirty miles, and that on leaving he drove to Painesville, about thirty miles distant, in an opposite direction and was arrested on the same night. For the purpose of showing that the prisoner, when he hired the horses, did not intend to return with them, the State proved by one James Eberhart that, on the night before the defendant drove off the horses, he lodged with witness, and stole from witness twenty-five dollars in gold. The Supreme Court of Ohio held that the evidence was clearly inadmissible.

The case of *Walker v. Commonwealth*, reported in 1 Leigh, 574, and in which Judge Brockenbrough delivered a very learned opinion, is in many respects very similar to the case at bar. The defendant was indicted for stealing a watch of the value of fifty dollars, the property of one Elizabeth Bolton, and the Commonwealth introduced evidence to show that the watch had been taken without the consent of the owner from her house, and on the same day it was found in possession of the prisoner. The prisoner insisted that it was loaned to him by said Bolton, and, for the purpose of establishing the felonious intent, evidence was given by the prosecution that on the same day he took the watch he also stole a cloak from another person. Upon an appeal to the General Court of Virginia, this evidence was held inadmissible, and the judgment of the lower court reversed."

The court, in the last case cited, in further discussing the question as to the application of the testimony in the proof of intent, says:

"In the case at bar the State had the benefit of the usual presumption arising from the recent possession of the stolen property, and was therefore not driven to the necessity of proving intent by proving other felonies committed about the same time; and it is not perceived, therefore, how this case can be brought within any of the exceptions above referred to. The offenses proved were separate and distinct, and the defendants might have been indicted for each and every one of them. Though committed on the same day, and under circumstances of a similar character, yet they are not so blended or connected that the investigation of one involves an inquiry into the other."

To the same effect is the case of *State v. Tabor*, 95 Mo., loc. cit. 590, 8 S. W. 774. Sherwood, J., very forcibly approves of the well-settled general rule in respect to testimony of the character introduced in the case at bar. He says:

"There was no foundation laid for admitting evidence showing that the defendant had been confined in the penitentiary, and had escaped therefrom. Evidence of another crime is never admissible, unless so connected with the one then being investigated as to show that the commission of the former had something to do with the perpetration of the latter. Unless the apparently collateral crime be brought into a common system—a system of mutually dependent crimes—or unless it be so linked to the

crime under trial as to show that the former, though apparently an extraneous offense, is not so in reality, such evidence is not admissible, because it would be highly unreasonable and unjust to convict a man of the crime charged, simply for the reason that he had been guilty of another and distinct offense."

Judge Henry, in *State v. Reed*, 85 Mo. 194, very clearly expresses the views of the court on this subject. He says:

"On the trial of the cause the State was permitted to prove by one Kyle declarations of Fredericks of defendant's participation in the theft of a horse belonging to one Gentry, stolen about the time that Kyle's mare was stolen. This testimony should have been excluded. The defendant was indicted, not for stealing Gentry's horse, or as an accessory after the fact to that theft, but as an accessory after the fact to the stealing of Kyle's mare. There was no such intimate connection between the two crimes, that, in proving the one, the evidence necessarily tended to prove the other. Nor is there any resemblance between these crimes and that of counterfeiting and passing counterfeit money, and similar cases in which it is allowable to prove other criminal acts than those charged in the indictment. These are exceptional cases."

In *State v. Daubert*, 42 Mo. 242—a case of larceny, involving the same question as the one before us—Wagner, J., said, citing *State v. Goetz*, *supra*, in support of the position:

"The court erred palpably in admitting testimony of different acts of larceny, when they were entirely disconnected with the offense charged in the indictment, and had no real tendency to prove the same. Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible."

It will be noticed how uniform the foregoing cases are in support of this general rule, and as indicating how firmly established is this principle of evidence. There is an entire absence in all the subsequent cases of even a criticism of the rule as announced. On the contrary, they are approved in the cases of *State v. Reavis*, 71 Mo. 419, *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72, and *State v. Harrold*, 38 Mo. 496, and are in perfect accord with the overwhelming weight of authority in the other States.

It is hardly necessary to discuss the cases decided by this

court falling within the exceptions to this rule. The case of *State v. Goetz, supra*, herein quoted from, fully reviews the cases in which the exception is applicable.

In the case of *People v. Molineux, supra*, the grounds of the exceptions are very clearly stated in the very able opinion of the learned judge in that case. He says:

"Generally speaking, evidence of other crimes is competent to prove the specific crime when it tends to establish, first, motive; second, intent; third, the absence of mistake or accident; fourth, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; fifth, the identity of the person charged with the commission of the crime on trial."

In the case of *State v. Greenwade*, 72 Mo. 298, which was a case of robbery, the court very properly held the testimony was within the exception. In that case an accomplice testified that there was a conspiracy or scheme to commit several robberies. To corroborate this accomplice, as to this common design, the testimony of a robbery committed by the defendant about the same time was admitted; but the learned judge was particular in calling attention to the fact that the admission of this testimony did not conflict with the ruling in *State v. Reavis, supra*.

The leading case attracting our attention, in which all the authorities are very ably reviewed and discussed, is the case of *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389. That case was predicated upon the statute for obtaining property by means of a trick or fraud. Testimony as to similar acts to those charged was admitted, and properly so, for they fall within the exception, as tending to prove the method of operating and intent of the defendant. After reviewing all the authorities, Phillips, C., says, quoting from *Bottomley v. United States*, 1 Story, 135.

"In all cases where the guilt of the party depends upon the intent, purpose or design, with which the act is done or upon his guilty knowledge thereof, I understand it to be the general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge." It will be observed in the last case cited that the general rule is admitted. The case of *State v. Wilson*, 143 Mo. 334, 44 S. W. 722, it will be observed, is a case concededly falling within the exception. The crime charged

was for fraudulently obtaining goods, and involved the proof of intent. *State v. Hodges*, 144 Mo. 50, 45 S. W. 1093, was a charge of forgery, and this is within the exception. We deem this a sufficient reference to the cases where the rule as to the exception was applicable. However, there is one case which has attracted our attention, and, without an investigation of the record, the announcement of the rule by the learned judge would seem to be in conflict with all the authorities herein cited; that is, the case of *State v. Balch*, 136 Mo. 104, 37 S. W. 808. Sherwood, J., says: "And it was competent, also, to introduce evidence of a subsequent robbery, so recently and subsequently committed, and in circumstances so very similar to the one under review, as to show that that one was part of the system or series of criminal operations; and this for the purpose, also, of proving the guilty and common intent which prompted the doing of the act done, and as showing defendant's manner and method of performing such acts. See *State v. Myers*, 82 Mo. 558 [52 Am. Rep. 389]." In support of this expression of opinion, he cites *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389. In the *Balch Case* the defendant was charged with robbery, combined with the offense of larceny in stealing a watch. When he was arrested he had in his possession two watches. The learned judge, in the opinion, detailing the facts, says: "Defendant claimed that the second watch was obtained by him on the night of his arrest in precisely the same way, being given to him by a party whom he had caught in a compromising position with a young woman. The State, in rebuttal, introduced a young woman named Robinson, who testified, over the objection of defendant, that on the night he was arrested she was in company with one Morrow, sitting upon the grass, after a walk, when defendant came out of a clump of bushes near by, and obtained the watch of Morrow under circumstances similar to those of the former case." The broad announcement of the rule as above quoted must be construed as applicable to the particular facts upon which it is based. In view of the claim of defendant, this testimony was clearly competent in rebuttal, but it is clear that the learned judge never intended his expressions to be of general application, for the same able judge forcibly expressed his views in the case of *State v. Tabor*, *supra*, and no reference is made as to any change in his reasons, nor is there any men-

tion of the long and unbroken line of decisions in this State declaring in unmistakable terms the general rule upon this subject.

We have thus carefully discussed and reviewed the authorities as to the general rule, and the cases falling within the exception, and this leads to the determination of the question as to whether the testimony of witness Damschroeder in respect to the second robbery falls within the exception of the general rule in the admission of such testimony. We have reached the conclusion that it does not, and that the learned trial judge committed error in its admission.

It may be urged that it was near the same time and locality. So were the larcenies committed in the *Goetz Case*, in the same city, near the same time and locality; and it appears in that case that the proof embodied larcenies committed in various stores, yet they were separate and distinct offenses, and were ruled to be inadmissible. The testimony of a separate offense must have some tendency to prove the charge in the indictment. It is admissible only on the ground that it has some logical connection with the offense proposed to be proven. It is clearly not admissible on the theory that, if a person will commit one offense, he will commit another. From the instruction of the court given in this case, it appears this testimony was admitted for the purpose of showing intent. This was error. The facts constituting the offense, and the very act itself, as shown by the prosecuting witness, were sufficient evidence of intent. The act of defendant, if he committed it, needed no explanation to indicate intent. The act itself carried the intent with it. The instruction further proceeds on the theory of corroboration. We are unable to discover how the details of the robbery as to witness Damschroeder tended to prove that he robbed the prosecuting witness. It is true, the time was close, but the distance was a half or three-quarters of a mile between the two. It had no such tendency, except we take the view that, because he commits one offense, he would commit another; and, as before stated, this is not the rule.

The only testimony of witness Damschroeder which is admissible in this case is that part, and that part alone, in which he states that he saw the defendant in the locality where prosecuting witness was robbed. This much of his testimony the State was entitled to, but, as to detailing all the facts constituting another

robbery, it was, we think, clearly incompetent. "Upon the trial of a person charged with assault to rob, it is not competent for the State, in aid of the prosecution, to prove other assaults committed by the defendant, whether with or without intent. In so far as the testimony admitted tended to show that the defendant was in the vicinity at the time the offense charged in the indictment was committed, it was clearly admissible; but in so far as it tended simply to show an attack of like character committed by him upon another person, and at another time and place, it was clearly inadmissible." *Coble v. State*, 31 Ohio St. 102.

Defendant was only required to meet the charge of robbery in the indictment, and he is not required to, or is he presumed to know that he will have to, meet and repel testimony as to a separate and distinct offense. This is loading him with a burden that the law does not sanction. The State had the testimony of the prosecuting witness as to this robbery, his identification of the defendant, and ample testimony, if believed by the jury, to convict him, and there was no necessity for invading well-settled rules of evidence.

For the reasons herein expressed, the judgment will be reversed, and the cause remanded. All concur.

STATE V. SMITH.

174 Mo. 586—74 S. W. Rep. 624.

Decided May 19, 1903.

ROBBERY: *Defective instruction, feature of felonious intent omitted.*

An instruction which omits the felonious intent of the taking, to-wit, to deprive the owner of his property without any honest claim to it and to wrongfully convert it to the use of the robber, does not define robbery, and if no other instruction supplies this essential element of the crime, a judgment of conviction cannot stand.

Appeal from Criminal Court, Buchanan County; Hon. B. J. Casteel, Judge.

Arthur Smith, convicted of robbery, appeals. Reversed.

L. A. Michelson, Elliott Spaulding, and Jas. M. Wilson, for the appellant.

Edward C. Crow, Attorney General, for the State.

GANTT, P. J. The defendant was indicted in the Buchanan County Criminal Court for robbery in the first degree, and convicted, and sentenced to the penitentiary for five years.

He seeks a reversal of the judgment, and assigns as error the instruction numbered 2 in the bill of exceptions. The instruction is in these words:

"The court instructs the jury that if they believe and find from the evidence that at the county of Buchanan and State of Missouri, and on or about the 20th day of September, 1900, the defendant, by himself or in company with another, assaulted William D. Boyer, and from his person and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person, did feloniously rob, steal, take, and carry away, of the property of said William D. Boyer, one gold watch, ten cents in lawful money of the United States, three pocketbooks, a railroad mileage book, one bunch of keys, one tape measure, one pair of scissors, one comb, or any of said property, of any value, you will find the defendant guilty of robbery in the first degree, and assess his punishment at imprisonment in the penitentiary for any term not less than five years."

It was ruled in *State v. O'Connor*, 105 Mo. 121, 16 S. W. 510, that an instruction in all material respects like this failed to define robbery, in that it omitted the felonious intent of the taking, to wit, to deprive the owner of his property without any honest claim to it, and to deprive the owner of it, and to wrongfully convert it to the use of the robber. That ruling was subsequently indorsed and followed in *State v. Woodward*, 131 Mo. 369, 33 S. W. 14, and *State v. McLain*, 159 Mo., loc. cit. 352, 60 S. W. 736. A like principle was announced in *State v. Ware*, 62 Mo., loc. cit. 601, 602. No other instruction in this case supplies this essential description of the elements of the crime of robbery, and for this reason the judgment must be reversed, and the cause remanded for a new trial.

BURGESS and FOX, JJ., concur

y; Hon. B. J.

Reversed.

M. Wilson, for

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STATE V. MORGAN.

31 Wash. 226—71 Pac. Rep. 723.

Decided March 7, 1903.

ROBBERY: *Insufficiency of the information—Failure to allege ownership of property.*

An information charging larceny, committed by unlawfully and feloniously stealing and taking away certain property from the person of another is insufficient, when it fails to allege the ownership of the property. (*State v. Dengel*, 24 Wash. 49, followed.)

Appeal from the Superior Court; Snohomish County; Hon. John C. Denney, Judge.

Harry Morgan, convicted of robbery, appeals. Reversed.

S. A. Bostwick, for the plaintiff in error.

H. D. Cooley, Prosecuting Attorney, for the State.

FULLERTON, C. J. The appellant and one Corena Wright were jointly informed against by the prosecuting attorney of Snohomish County for the crime of robbery. The information, omitting the formal parts, was as follows: "Comes now H. D. Cooley, county and prosecuting attorney in and for Snohomish County, State of Washington, and by this, his information, accuses Corena Wright and Harry Morgan of the crime of larceny from the person, committed as follows, to wit: That the said Corena Wright and Harry Morgan, at the city of Everett, in the County of Snohomish and State of Washington, on the 4th day of March, 1902, did unlawfully and feloniously, but without violence or putting in fear, take, steal, and carry away from the person of one Frank Meeks, then and there being, one gold-filled hunting case Elgin watch, of the value of \$20, and one gold band ring, of the value of \$5.00, all of the value of \$25 in lawful money of the United States; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Washington. "

A demurrer to the information was interposed by the defendants on the ground that it did not state facts sufficient to constitute a crime. The demurrer was overruled, whereupon the respondent entered a plea of not guilty, and demanded and was granted a separate trial. The trial resulted in a verdict of guilty as

charged in the information, and he appeals from the judgment and sentence pronounced thereon.

It will be noticed that the information contains no allegation as to the ownership of the property alleged to have been taken from the person of Meeks, and the sole question presented by the record is, does this omission render the information insufficient? In *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104, an information for robbery by violence and putting in fear which omitted to allege ownership of the property taken was held not to state a crime. It is urged, however, that there is a distinction between that case and the case at bar, in that the information in that case does not contain the word "steal" in its charging part, while the present one does contain such word. But it seems to us that this distinction is not material. The words "did feloniously steal and take," are no more effective to charge ownership of property than are the words "did feloniously take." The case cited is squarely in point, and, being so, is controlling.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the information.

DUNBAR, MOUNT, and ANDERS, JJ., concur.

STATE V. JOHNSON.

26 Mont. 9—66 Pac. Rep. 290.

Decided October 21, 1901.

ROBBERY: *Definition—Instructions.—Error, when presumed to be prejudicial.*

1. Under Penal Code, Sec. 390, defining robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, "accomplished" by means of force or fear, an instruction defining robbery in the same terms, except using the word "accompanied," is reversible error.
2. An erroneous instruction is presumptively prejudicial.

Appeal from District Court, Silver Bow County; Hon. William Clancy, Judge.

George Johnson, convicted of robbery, appeals. Reversed.

B. S. Thresher, for the appellant.

Jas. Donovan, Attorney General, for the State.

PICOTT, J. The defendant has appealed from a judgment of conviction for the crime of robbery, specifying as the only error the giving by the District Court of the following instruction: "Robbery is the felonious taking of personal property from the possession of another, from his person or immediate presence, and against his will, accompanied by means of force or fear." The Attorney General insists that this instruction states all the elements necessary to constitute robbery, which, by section 390 of the Penal Code, is defined to be "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." He argues that the definition given by the instruction is the substantial equivalent of the statutory definition. We are unable to agree with him. Between "accomplished" and "accompanied" a clear distinction in meaning exists. For example, thunder often accompanies lightning, but thunder is not the means or agency whereby the physical results of lightning are accomplished. Again, the means by which an act could have been accomplished may have accompanied the doing of the act without being the efficient means or agency; that is, without accomplishing it. A deadly weapon, or a squad of armed soldiers, is a means of force; so either may inspire fear, and in that sense be the means of fear. But it cannot correctly be said, as matter of law, that, because such means of force or fear accompanied an act, the act was accomplished thereby. There can be no robbery unless the taking is accomplished (that is, effected) by means of force or fear. The agency (the means) whereby the felonious taking is effected (that is, accomplished) must be force or fear, otherwise robbery is not committed. Many felonious asportations from the person or immediate presence of another are accompanied (that is, attended) by means of force and (perhaps) fear without being accomplished by means of either. A. feloniously and against B.'s will takes from the person of B. a chattel in his possession, the taking being accompanied, but not accomplished, by means of force. Although A. may be guilty of larceny, he is not guilty of robbery. The means of force and fear may accompany (that is, be present at, go with, or be associated with) a felonious taking, and yet not be the means or agency by which the taking is accomplished (that is, effected, consummated, completed, or executed). The

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instruction would not be bettered by eliminating the words "means of." It would then read: "Robbery is the felonious taking of personal property from the possession of another, from his person or immediate presence, and against his will, accompanied by force or fear." The instruction would still be fatally bad, for the taking may be accompanied by force and fear, and yet not be accomplished by either. Whether the instruction declares that, in robbery, the taking need not be from the person or immediate presence of another, but is sufficient if it be from the possession of another, we do not decide. As the question whether the instruction is open to this objection is not likely to arise on a new trial, we express no opinion thereon. The defendant was entitled to a correct instruction defining the crime of which he stood charged. An essential element was omitted in the instruction given. This was erroneous, and, presumptively, prejudicial to the defendant. The judgment is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and MILBURN, J., concur.

PEOPLE v. RICHARDS.

136 Cal. 127—68 Pac. Rep. 477.

Decided March 22, 1902.

ROBBERY—INFORMATION—VARIANCE: *Sufficiency of the information—Variance between the information and the instructions—Error presumed prejudicial.*

1. Where an information charging robbery, is in all other respects sufficient and is not assailed by a special demurrer, a slight defect in the description of the property alleged to have been taken, such as, "about ninety cents or more," is not fatal.
2. Under such an information, it was error for the court to instruct the jury that the defendant could be found guilty, if it was proven beyond all reasonable doubt, that he took "any personal property belonging to" the prosecutor, against his will, etc.
3. In the absence of the evidence, such error is presumed to be prejudicial. "While error will not be presumed, injury from error will be presumed.

Department No. 1. Appeal from Superior Court, Merced County; Hon. E. N. Rector, Judge.

James Richards, convicted of robbery, appeals. Reversed.

C. H. Marks, for the appellant.

Tirey L. Ford, Attorney General, and *A. A. Moore, Jr.*, Deputy Attorney General, for the People.

GAROUTTE, J. The defendant was convicted of the crime of robbery, and appeals from the judgment. Two contentions are made by the appeal, viz.: (1) The information is not sufficient; (2) the court erred in instructing the jury.

After the jury was sworn, the defendant moved the court to disallow any testimony, upon the ground that the information did not state facts sufficient to constitute a public offense; and after conviction he moved an arrest of judgment upon the same ground. These motions were denied.

It is not questioned that the information sufficiently charges the crime of robbery from the person by means of force and violence, except as to the description and value of the property taken. The property taken was alleged to be personal property of Frank Geary, and to consist of "about ninety cents or more." The facts charged constitute a public offense. *People v. Chuey Ying Git*, 100 Cal. 437, 34 Pac. 1080. It therefore follows that the motions made to disallow testimony, and to arrest the judgment, were properly denied. Possibly the information is susceptible to a special demurrer, but no demurrer was urged against it.

It is claimed the court erred in instructing the jury as follows: "If you are satisfied from the evidence to a moral certainty, and beyond a reasonable doubt, that the defendant, by means of force and violence, took from the person and possession of Frank Geary, and against the will of said Geary, any personal property belonging to said Geary, then your verdict should be guilty."

This instruction was clearly erroneous. The defendant was charged with the crime of robbery alleged to have consisted in taking certain particular personal property, to wit, "about ninety cents or more." By this instruction the jury was told to convict if the crime of robbery was committed by him in the taking of any personal property from Frank Geary. If the evidence disclosed that he took from Geary a knife or hat or watch, then this instruction told them that they should convict

him. Under the information the defendant could only be convicted by the production of evidence showing that he took personal property answering substantially to that described in the pleading, and an instruction to the jury should have been given to that effect. It is thus plain that the instruction is erroneous. Upon its face it presents an unsound proposition of law. Viewed from any and every angle, it is unsound, for under no possible state of circumstances which the record might present, if the evidence was before us upon a bill of exceptions, can its legality be justified.

The order denying a new trial is not appealed from, nor is there in the record any statement or bill of exceptions disclosing the evidence. Hence the court cannot say that the instruction is harmless. While error will not be presumed, injury from error will be presumed; and upon the record as it stands it is impossible for the court to say that no injury resulted to defendant from the giving of this instruction. It is said in *People v. Kamaunu*, 110 Cal. 612, 42 Pac. 1090: "And, if it be admitted that there was error, the question then would be, did the error affect the substantial rights of the defendant? If we cannot determine whether there was injury or not, then, since the defendant has not been tried as the law of the land directs, we must presume injury. For to be so tried is his right. But, if we can see that he has not been injured, the judgment will be allowed to stand." Here the court cannot see that the defendant has not been injured by the erroneous instruction. See, also, *People v. Murphy*, 47 Cal. 105; *People v. Furtado*, 57 Cal. 347.

For the foregoing reasons the judgment is reversed, and the cause remanded for a new trial.

HARRISON, J.; VAN DYKE, J. concurred.

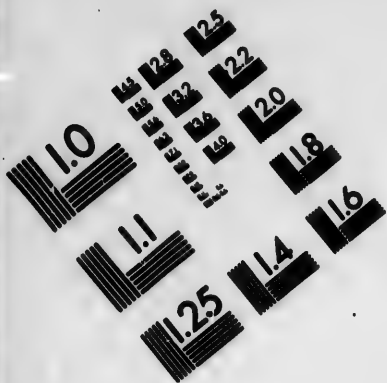
STATE v. MINOT ET AL.

79 Minn. 118—81 N. W. Rep. 753.

Decided February 7, 1900.

ROBBERY: *Train robbery—Evidence—Display of weapons in evidence—Expert testimony—Res Gestae—Non-prejudicial error—Alibi.*

Defendants were indicted, with three other persons, of robbery in the first



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degree, committed by taking \$20 from the person of the conductor, after holding up a train and attempting to break the express safe. The State offered in evidence in a body the tools and implements found in possession of defendants at time of arrest. Held:—

1. Not error under the circumstances.
2. Not error to receive in evidence said tools and implements, although not used in securing the money from the person, it appearing that such articles might have been employed in the crime attempted upon the express car and safe.
3. Not error to receive expert testimony as to the character and use of said implements.
4. Judgment is justified by the evidence.
(Syllabus by the court.)

Appeal from District Court, C.ter Tail County, Hon. D. B. Searle, Judge.

Homer S. Minot and others convicted of robbery, appeal. Affirmed.

A. G. Broker and *Chas. C. Houpt*, for the appellants.

W. B. Douglas, Attorney General, *C. L. Hilton*, County Attorney, and *Jno. W. Mason*, for the State.

LEWIS, J. Defendants Minot, Hoffman, and Hall were indicted for robbery in the first degree, in November, 1898, in connection with three other parties, Link Thayer, Edwards, and Ross. Thayer was tried at the November term of court of Otter Tail county, and convicted as charged in the indictment. As to Edwards and Ross, the record is silent, and the other three were brought to trial at the May term, 1899, resulting in a conviction of all three. Defendants appeal from the judgment entered therein.

The evidence offered by the State tended to prove the following facts: That at about 8 o'clock, on the evening of November 10, 1898, at a point one mile east of Carlisle Station, and about eight miles west from Fergus Falls, the through coast train on the Great Northern Railroad was held up by four persons, who were armed and masked. That two of the men had boarded the train at Fergus Falls, and, going onto the engine, had, at the point of guns, caused the engineer to stop the train, and after it were supposed to be in waiting, attempted to enter the safe in was stopped these men, in connection with the other two, who the express car, but failed in this, after delaying the train about

one hour. While some of the men were engaged in trying to open the safe, the conductor, George A. Bruce, was relieved of \$20, and it was for this particular act that the men were indicted. At about 9 o'clock the robbers gave up the task of breaking the safe, and disappeared in the darkness. It further appeared from the evidence: That on the 27th of October, 1898, Thayer, Minot, Hoffman, and Hall had left Breckenridge, and gone to Clitherall, about 50 miles distant. That Thayer returned to Breckenridge on the morning of November 9th, the other three going back to Breckenridge on the morning of November 10th, arriving there about 8 o'clock a. m., and were met at the depot by Thayer. They carried two guns in canvas cases,—one a long, and one a short, case. They placed these guns in a saloon soon after arrival, and the guns were seen at the same place at 12 o'clock, but at 1 o'clock they were gone. At 11 o'clock next forenoon the guns were found in the saloon again. Thayer was seen at Breckenridge at about 2:30 a. m., November 11th, and at 3:10 a. m., the same day, the four men took the train at Wahpeton or Breckenridge, and arrived at Moorhead at about 5 o'clock a. m., and went to bed at a hotel. At about 8 o'clock a. m. they were arrested, in connection with Edwards and Ross, who were in their company. All were searched by the chief of police of Moorhead. Thayer and Minot were found in bed together, and the other two in a different room, at same hotel. On each man was found a revolver and on Hoffman five drills, four wedges, two picks, and skeleton tools; also a stick of dynamite and fuse. On Hall was found some explosive caps, and concealed in his coat flap some small saws. From Thayer, while with Minot in the room at the hotel, were taken six drills and two punches.

One witness for the State testified that he had seen Thayer near the scene of the hold-up on November 5, 1898. Messenger McIlrath testified that he was in the express car at the time of the attempt to open it, and that Thayer was the man at work; that his mask fell off, and there was light enough to see. Two other witnesses testified that they had met Thayer and Minot in the road within three or four miles of Carlisle, about 5 o'clock p. m., November 10th. A witness testified to seeing Minot near Carlisle at 2 o'clock p. m., November 10th, and a witness stated that he had seen two men board the train at Fergus Falls, as it passed through, about 7:30 p. m. One was a large, and one a

small, man. They were carrying guns in canvas cases,—one short, one long. That he had seen one of the same men in the morning of the same day.

The defense attempted to prove an *alibi* as to each defendant, and also prove that three other suspicious characters were found in a straw-stack five miles east from Breckenridge, at 10 o'clock a. m., November 11th. It appears from the evidence that Breckenridge is about 25 miles west of Fergus Falls, and Carlisle about 8 miles northwest from Fergus Falls, and about 26 miles northeast from Breckenridge. Wahpeton is about one mile west from Breckenridge. There was testimony on the part of the State to the effect that Thayer, the man identified by the messenger, was a large, heavy man, over six feet high; that one of the other men was nearly as large, and one quite small as compared with Thayer, and one medium size; that the men at the time of the robbery designated each other by the numbers 4, 5, 6, and 7. The witness who saw the two men board the train at Fergus Falls testified that he heard the larger of the two say to the smaller, "Be sure of your number, Charlie; 4. I wonder if 7 will make it." The same witness also stated that he identified the larger man as Minot. The messenger testified that the man designated as No. 4 by Thayer in the car was not over 5 feet 9 inches in height, and would weigh probably 170 pounds.

The defense assign as error that the court permitted an unwarranted display of the tools and arms taken from defendants at the time of their arrest. It appears from the record that all the tools and arms above described were placed upon a board, and, being properly marked for identification, were brought into court, and presented to the witnesses causing the arrest to identify them. The collection consisted of the tools taken from the possession of all the six persons found together at Moorhead. The mere fact that they were brought into court in mass, instead of singly, for identification, could hardly be such a display as would prejudice the jury. A trial court should use reasonable care in preventing unusual exhibitions of this character, which might tend to influence a jury, but there is no reason to believe that the occurrence complained of was prejudicial.

A witness on the part of the State was permitted to testify as to the character of the implements found in possession of the defendants. He stated that the files were used, as a general thing,

in picking door locks, the drills and punches for opening safes, the ratchet for drilling, and the explosives for the same purpose. This admission of this testimony is assigned as error. The use of such articles in opening locks and safes, and the manner of their application to such purposes, is not of such common knowledge as to preclude expert testimony. The reception of such testimony is within the general rule governing the application of expert testimony in reference to the nature and use of machinery and mechanical appliances.

The court received in evidence, against defendants' objection, all of the articles, without discrimination, found in possession of the six men arrested at Moorhead, and this is assigned as error. One of the objections presented in support of this assignment is that two of the revolvers were taken from Edwards and Ross, who were not on trial, and hence the presentation and receiving in evidence of their revolvers was prejudicial as to three defendants on trial. Another objection urged is that the specific crime charged against the defendants is robbery, by taking \$20 from the person of Bruce, and none of the articles, except the revolvers, were admissible, because they were not such implements as would tend to show an intent to forcibly take from the person.

Technically, it was error to receive in evidence the two revolvers found upon Edwards and Ross, who were not then on trial. But it is apparent that such error could not have prejudiced the substantial rights of appellants; for the only significance of the revolvers as evidence was for the purpose of showing that appellants and Thayer were armed, when arrested, with the same kind of weapons as were used in holding up the train and robbing the conductor. This fact was shown by the identification and introduction in evidence of the four revolvers found on the defendants and Thayer, respectively, in connection with evidence that the four persons holding up the train were similarly armed. Proof of this fact in no manner depended on the revolvers found on Edwards and Ross, and the mere fact that six revolvers, instead of four, were exhibited in evidence, with proof that only four of them were found upon defendants and Thayer, would have no reasonable tendency to prejudice their rights. With this exception, it was proper to receive in evidence all of the implements mentioned. While the specific crime charged in the indictment was robbery by taking \$20 from the person of the conductor,

Bruce, yet these tools and revolvers formed one of the links in the chain of circumstances tending to fix the guilt upon defendants. The whole transaction surrounding the hold-up—the attempt to open the car and the safe—formed a part of the *res gestæ*. The tools and articles found upon the defendants were such as might have been used in accomplishing such purpose as was attempted. The same parties who held up the train, opened the car, and attempted to open the safe took the money from Bruce.

The defendants also claim that the evidence fails to support the judgment; that, as a matter of law, the evidence is so uncertain as to the identity of the parties that a reasonable doubt arises as to the defendants' guilt. The defendants present the argument thus: The State, by its evidence, placed the three men, Minot, Hoffman, and Hall, in Clitherall prior to November 10th. That on the morning of November 10th they went to Breckenridge, and met Thayer, and placed their guns in a saloon, where they still were seen at 12 o'clock noon. That Minot could not get from Breckenridge to Carlisle in time to be seen by Larson at 2 o'clock p. m., and back to Fergus Falls, to catch the train, at 7:30, it appearing that he traveled on foot. That the men could not go from the scene of the hold-up after 9 o'clock p. m., and reach Breckenridge by 2:30 a. m., November 11th. The guns were taken from the saloon at Breckenridge between 12 and 1 o'clock, November 10th. That the parties who took them could not have reached Fergus Falls in time for the train without being seen. That the evidence as to *alibi* was so clear and specific to the effect that they were in Breckenridge and Wahpeton all of the 10th, and until taking the train in the morning, that the jury must have ignored it altogether. That the testimony of identity of defendants by the State's witnesses was too indefinite and uncertain to be relied upon, and that the presence of three other suspicious characters in the vicinity of Breckenridge on the morning of the 11th, and in Fergus Falls on the 10th, was sufficient to raise a reasonable doubt of the guilt of the defendants. In answer, it is sufficient to say that it was entirely possible for the defendants to separate and leave Breckenridge at different times on the 10th, and reach the places fixed by the State, and they may have traveled in part by team or train. It was entirely possible to reach Breckenridge again by 2:30 a. m. on the 11th, leaving Carlisle at 9 p. m. on the 10th. It would be just as

reasonable for the jury to infer that the three other questionable characters were co-operating with defendants, though not seen at the robbery, as to infer that the crime was committed by them alone.

As to identity, the evidence is convincing as to Thayer, and almost as strong as to Minot. Hoffman and Hall were not identified, except that they corresponded in size to two of the men engaged in the robbery. The facts that their association and connection with Minot and Thayer had been close before and after the robbery; were found in the same places of resort, where crime is harbored and protected; were equally armed and equipped with the implements of a felonious occupation, and such as were employed in the commission of the crime charged,—present such a chain of circumstances as, unexplained, would justify the jury in finding beyond a reasonable doubt that they participated in the felony. As to the *alibi*, it was for the jury to say whether any credit should be given to the evidence. While this line of defense is competent, such evidence is generally subject to searching scrutiny. It is easy to prepare for it in advance, and, after reading the record, we are satisfied that the jury would have been justified in rejecting it entirely. Judgment affirmed.

STATE V. ALEXANDER.

66 Kan. 726—72 Pac. Rep. 227.

Decided April 11, 1903.

ROBBERY—VARIANCE—FORMER JEOPARDY: *Proof of "gold filled watch case" not variant from "gold watch"—Circumstantial evidence—Proof of injuries to show force—Disagreement of jury at former trial.*

1. The information in this case charged robbery in the first degree in the taking from the person of another, by force and violence, a lady's gold watch and chain. The proof shows the watch to be a lady's gold-filled case watch. Held, no variance.
2. The evidence relied upon to sustain the charge of robbery was circumstantial. It was not error to show the extent of the injuries inflicted on the person robbed for the purpose of showing that force and violence were used in the commission of the robbery.
3. The record of a former trial reads: "The said jury by order of the court were brought into open court, and, it appearing to the court that the said jury are unable to agree upon a verdict, and that there is no reasonable probability of their being able to agree upon a verdict,

they are discharged from further consideration of this case." This record sufficiently shows a disagreement of the jury and a plea of former jeopardy based thereon was properly overruled.

(Syllabus by the court.)

Appeal from District Court, Brown County; Hon. Wm. I. Stuart, Judge.

Emery Alexander, convicted of robbery, appeals. Affirmed.

Buckles & Pearl, for the appellant.

C. C. Coleman, Attorney General, and *W. F. Means*, County Attorney for the appellee.

POLLOCK, J. On Sunday evening, November 3, 1901, persons returning from church services in the City of Hiawatha about 9 o'clock discovered one T. C. Horr sitting upon the steps of the Central School building in that city in a semiconscious condition, bruised, wounded, and bleeding. Further investigation disclosed the place where the injury had been received, that the wounds had apparently been made with a blunt instrument, and that a lady's watch and chain which he had carried was missing from his person. It further appeared that Horr had arrived in Hiawatha the day before, had deposited a sum of money with the clerk at the hotel where he stopped, and had taken a receipt therefor. This receipt was found near where the injury was received.

Emery Alexander, the appellant, Herman Maxie, and William Suggs were arrested, and jointly charged with the offense of robbery in the first degree. A *nolle prosequi* was entered as to Maxie and Suggs. Alexander was tried, convicted, and sentenced for robbery in the first degree, and appeals.

The first contention made by counsel for appellant is that the evidence is wholly insufficient to uphold the conviction. The record discloses that Horr had been drinking heavily prior to the occurrence, and claimed upon the trial to have no recollection of anything which occurred at, or for hours prior to the commission of the offense. Hence the evidence obtainable to secure a conviction was almost wholly circumstantial. The fact that Horr when found, was wounded, bleeding, his nose broken, an eye knocked out, the receipt taken from his person, the watch and chain gone, sufficiently establishes the fact that he had been assaulted and robbed by some person. The further testimony that Maxie, Suggs, and appellant were associates; that appellant was

seen talking with Horr on the day of the occurrence, and in the evening told Maxie there was an old man up town who had some money, and asked Maxie to help him get it; and when appellant and Maxie went up town, and Horr was seen standing on the street, appellant said to Maxie, "There is the old fellow now," and called Horr off, and had some conversation with him; that when appellant and Maxie separated, appellant said to Maxie, "Well, if you hear anything, don't say anything about it;" that soon after the crime must have been committed appellant brought to the livery barn a lady's watch, such as that carried by Horr, and turned it over to Suggs; and that three men were seen going in the direction of the place where the offense was committed shortly before it must have transpired—affords ample proof of appellant's connection with the commission of the offense, and the probable connection of the others with its commission.

Again, it is contended, that as the information charges the taking of a lady's gold watch and chain, and the proof shows the watch taken was a lady's gold-filled case watch, there is a fatal variance between allegation and proof. We think such variance between allegation and proof in this case wholly unimportant, as only an actual examination by one experienced in such matters could distinguish the difference.

Further complaint is made of the reception of evidence tending to show the extent of the injuries received by Horr. As the charge was the taking of property belonging to Horr from his person by violence, and, as has been seen, the State was compelled to rely upon circumstantial evidence to sustain this charge, it was proper to show the extent and nature of Horr's injuries as tending to prove that violence was used in the commission of the offense.

Again, it is contended that the court erred in its charge to the jury, and particularly in not instructing the jury fully as to what constitutes an accessory. Upon this proposition the court instructed in the language of the statute. This statute is plain, simple, and easily understood. There was evidence to support such instruction. We have examined the instructions, and find no error in the same.

There had been a prior trial of this case, at which the jury had disagreed. The record discharging the jury upon such disagreement reads as follows:

"The said jury having heard the evidence adduced, and having been instructed in writing by the court, and having heard the argument of the counsel, retire on the 11th day of February, 1902, in charge of a sworn officer, to deliberate upon their verdict, and afterwards, on the 12th day of February, 1902, the parties being present as on the trial of said cause, the said jury, by order of the court, were brought into open court, and, it appearing to the court that the said jury are unable to agree upon a verdict, and that there is no reasonable probability of their being able to agree upon a verdict, they are discharged from further consideration of this case."

A plea of former jeopardy was entered and overruled, it is contended this is error. In support of this contention the cases of *The State v. Allen*, 59 Kan. 758, 54 Pac. 1060, and *The State v. Start*, 62 Kan. 111, 61 Pac. 294, are cited. An examination of those cases will show they are not authority here. Here an actual disagreement of the jury is made to appear to and found by the court, and the discharge of the jury on account of such disagreement is shown by the record. Such record is sufficient.

Judgment affirmed.

All the Justices concurring.

MURPHY V. STATE.

Texas—Court of Criminal Appeals—57 S. W. Rep. 987.

Decided June 20, 1900.

TRIAL—MISCONDUCT OF JUDGE, in *prejudicial remarks and threats addressed to the entire panel of petit jurors*.

1. The presiding judge delivered a general lecture to the entire panel of petit jurors, previous to their being selected to try any particular case, in which he ridiculed the doctrines of self-defense and reasonable doubt, commented upon the fact that the State cannot appeal from an acquittal, threatened the jury that he should fine any juror who should make an affidavit to impeach a verdict to which he had previously consented. Held,
 1. That the defendant's challenges of jurors for that cause should have been sustained.
 2. That the error in making the remark, was not cured by the judge telling the jurors, that the remark did not apply to any particular case, and must not be regarded as law applying to such case.
 3. That the error was not cured by answers from the jurors that they

- would disregard such remarks and follow the instructions in the case.
4. That it was error to require the defendant, who had exhausted his peremptory challenges, to go to trial before such jury.
 2. "Judges are as much judges for the defendant as for the State, and are supposed to sit fairly and impartially between the rights of the State, on the one hand, and the defendant, on the other. To become a partisan either for the State or defendant is to desert the high position to which the judge is elevated, and assume the role of the advocate."

Appeal from the District Court, Ft. Bend County; Hon. Wells Thompson, Judge.

James Murphy convicted of murder appeals. Reversed.

C. C. Everett and *R. H. Woody*, for the appellant.

J. M. Pinckney, *S. C. Russell*, and *Robert A. John*, Assistant Attorney General, for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death. This is the second appeal of this case, the judgment having been reversed on the former appeal. 51 S. W. 949. (41 Tex. Crim. Rep. 120.)

The evidence discloses substantially the following facts: Some one entered the home of A. B. Kirkland at night, and, being aroused from sleep, deceased, Kirkland, grabbed hold of the burglar, and received a blow upon the head in the encounter, from the result of which he subsequently died. Appellant was arrested, charged with said offense; and there is a confession of appellant, in the record, that he committed the crime.

The main defense urged is the lack of identity of appellant, and the reasonable doubt growing out of said lack of identity.

When the District Court convened, at which this trial took place, the petit juries for each week, after being impaneled and sworn, and before any cases were submitted to them, were given a charge, on Monday of each week, which covers some eight pages of the record.

Upon the trial of this case appellant reserved various bills of exceptions because he was forced to accept jurors who had heard said charge, on the ground that said jurors had already been charged on reasonable doubt, in advance of a trial, and were therefore disqualified as jurors; and upon his objection, in each instance, being made, the court asked the juror the following question: "Would those instructions as to the duties of jurors

prejudice in any manner the rights of this defendant in your mind as a juror, should you be accepted?" To which the jurors answered "that they would not." The court thereupon held that said jurors were competent. Appellant was thus forced to take several members of the petit jury upon the trial of the case, each of whom had heard all of said charge, after his peremptory challenges had been exhausted.

Appended to one of the bill of exceptions is the following remarkable qualification by the trial court:

"After the jurors for this week of court were sworn in they were given the instructions or advice referred to in this motion to quash the venire, but said instructions or advice were prefaced by the following remarks to them: 'The advice I am about to give you is not given as the law of particular cases, and you must not regard it as the law appying to any case which comes, but only as advice which you can follow or not, as you see proper; and, should you at any time hereafter be interrogated as to the influence this advice may make upon you, you should understand that it is not given to you as the law of any particular case, for the law of any particular case will be given to you as such law at the time of the trial.'"

This remarkable instruction of the trial court is too voluminous to be copied in the opinion, and we only deem it necessary to quote extracts from same, showing the general tenor and character of it, as follows:

"Whenever you pass upon a question of fact, your finding thereon becomes final, from which there can be no appeal; and whenever you say by your verdict, in a criminal cause, that the defendant is not guilty, it makes no difference how outrageous this verdict may be, there can be no appeal, and he can walk forth from the court room in defiance of society, and continue to pursue his accustomed vocation of shooting down and murdering innocent people. Therefore you can at once see how very responsible your position is, and how dependent upon you for the protection of their lives and their property all society becomes."

This clearly carries with it the idea that every person accused of crime is necessarily guilty. We have frequently reversed cases where district attorneys used this spurious argument in the course of the prosecution. Then how much more erroneous does

it become when uttered to the jurors who are about to try one for his life, prior to the time the law authorizes the charge to be given to the jury! *Crow v. State*, 33 Tex. Cr. R. 264, 26 S. W. 209.

And again: "Or if you agree to a verdict simply because the majority of your fellows are against you, and you really do not believe such verdict so rendered by you is a just one, but, for some reason then known to yourselves, you return to the court such verdict, and thereby cause the court to believe such verdict to be your true verdict, and to receive it as such, and when you are discharged you should go out and denounce that verdict, and give reasons therefor which you did not give to or make known to the court when the verdict was rendered by you, and also then make an affidavit to that effect, to be used on a motion for new trial in the cause, you will put yourselves, by such conduct, in contempt of court; and in that event I think it my duty to warn you in advance, so that you may know the position in which you will place yourself, and say to you that I will fine you not less than \$100."

Such language was never used by a trial court in Texas before. Is it possible that a trial court would instruct a jury, if they arrived at a verdict by lot, or that either of them had not honestly agreed to the verdict, or, through fear or compulsion, had agreed, that he would fine him \$100 for making an affidavit to that effect? Can such an illegal innovation as this upon our jurisprudence go unrebuked? We say not. Judges are as much judges for the defendant as for the State, and are supposed to sit fairly and impartially between the rights of the State, on the one hand, and the defendant, on the other. To become a partisan either for the State or defendant is to desert the high position to which the judge is elevated, and assume the role of the advocate.

We also find in this record the same charge quoted in *Chapman v. State* (decided at the present term)—57 S. W. 965, 42 Tex. Crim. Rep. 135—and on which account the judgment in that case was reversed.

Then again: "Now, as you jurors are the exclusive judges of the credibility of the witnesses, it is for you to say, when defendant had murdered a helpless unarmed man, and he offers proof, by himself or his friends, that although the deceased had no weapon himself, and although he knew the defendant was himself armed, he (the deceased) actually threw his hand behind him

as if to draw a pistol, which he did not have and never had, and advanced on the armed defendant to certain death,—it is for you to say whether or not such testimony is true or false. I should, without hesitation, say that such testimony was manufactured and false, and I should promptly disregard it.”

This actually deprived defendant of the reasonable appearance of danger,—one of the rudimentary principles of the law of self-defense of this land. Then this very remarkable charge concludes as follows: “I wish to call your attention particularly to the doctrine of reasonable doubt, which is also so often used with such powerful effect in all criminal trials. Reasonable doubt is that state of a case which, after a full consideration of all the evidence, leaves a jury without an abiding conviction, to a moral certainty, of the truth of the accusation against the defendant. It must not be merely speculative, imaginary, possible, or conjectural. It must be real doubt, arising out of the whole case. There is always more or less conflict in the testimony in all cases. And this conflict is sometimes purposely injected into the trial for the sole purpose of creating a doubt in the minds of the jurors, when there is no other line of defense. But such doubts are not those reasonable doubts which justify acquittal. Our laws are intended for the protection of society, and, while they do not aim at the conviction of the innocent, yet it is of the utmost importance to all good citizens to see that the guilty do not escape.” In this we are told that conflicts in the evidence are purposely injected into the trial for the sole purpose of creating a doubt in the minds of the jurors, when there is no other line of defense. Is this the law of this land? If so, we have read the books in vain. Defendant is presumed to be innocent until his guilt is established by legal evidence, and in case of a reasonable doubt as to his guilt he is entitled to an acquittal. Defendant is not entitled to more than this, and the great state of Texas certainly cannot afford to grant less. The presumption of innocence should follow every defendant into a court of justice. This presumption should stay with him until it is overcome by reasonable and rational conclusions from facts legally proved. There is but one provision of the Procedure which authorizes a charge in a felony case, to wit, article 715, Code Cr. Proc., which, in substance, provides that the judge shall give a written charge to the jury after the conclusion of the argument; that he shall not express any

opinion as to the weight of evidence, nor shall he sum up the testimony. "This charge shall be given in all cases of felony, whether asked or not." It is a well-known rule of statutory construction that "*expressio unius est exclusio alterius*." Article 715, providing when, where, and how a judge shall charge a jury, by so doing excludes the idea that he may charge them some other way or at some other time. Then what is the attitude of appellant's rights in this case? The jury for each succeeding week prior to the time his case was called were given the charge, extracts from which have been quoted above, and several of the jurors served upon the trial of this case. In the trial of this case the judge gave the jury a proper charge, so far as we have had occasion to examine the same, but prior to the time this case was called he delivered to the jury the charge above referred to. Now, which charge will the jury consider? When the judge gave them the charge prior to the trial, he verbally told them, as above shown, that they must answer that said charge would not influence them in any particular case. Why was it necessary to give this admonition, if it would not influence them? This, it occurs to us, was intended to evade the plain, positive, and mandatory provisions of the statute as indicated in article 715, and to charge the jurors in advance what is unauthorized, and in a way which would avoid a reversal of the case.

We had hoped that this patent-right charge of the trial court would not be inflicted upon us any more, since the decision in *Jones v. State* (Tex. Cr. App.) 51 S. W. 949, and *Attaway v. Same*, 41 Tex. Cr. R. 395, 55 S. W. 45. But, if the trial court will persist in giving this charge, we have no alternative, under the law, but to reverse the case, because defendant has not had a fair and impartial trial, and because the statute in reference to charges has been violated.

For a further discussion of this character of charge, see *Chapman v. State*, decided at present term. In the view we take of this case, it is not necessary to discuss this matter further, or review the other assignments of error. But for the error discussed the judgment is reversed, and the cause remanded.

HENDERSON, J. I dissent, believing the case should be affirmed. For my views on the question discussed, see *Chapman v. State* (decided at present term)—57 S. W. 965, 42 Tex. Crim. Rep. 135—and *Attaway v. Same*, 55 S. W. 45.

NOTE (by J. F. G.).—The case of *Chapman v. State*, decided at the same term of Court, on June 13, 1900, and referred to in the opinion of the court and in the dissent in the above case, is a proper subject for notice at this place. It gives the individual opinions of each of the other judges of the Court of Criminal Appeals. The opinion and dissenting opinion in that case are as follows:

DAVIDSON, P. J. This conviction was for manslaughter, the punishment being assessed at three years' confinement in the penitentiary.

The trial judge, on Monday of each week, for three successive weeks prior to appellant's trial, read the petit jury a document which may be termed, for want of a more appropriate name, a general lecture as to their duties as jurors. A short excerpt will be sufficient to indicate the nature of the document, to wit:

"There is a defense for murder that is put in evidence in almost every case that is now tried, until the law-abiding citizen has become alarmed. It is the hip-pocket defense, by which the murderer seeks to justify under the law of self-defense. It has received its sanction in those cases which lay down the rule that the jury must judge the defendant's case from his own standpoint; that they must put themselves in his shoes, and look at his adversary just as he appeared to the defendant himself at the time he fired the fatal shot, and if the deceased made any demonstration, such as throwing his hands behind him, which reasonably appeared to defendant that his life was in danger, or that he was in danger of serious bodily injury, and defendant then killed deceased, that he would be justified under the law of self-defense. There may be something in the abstract theory thus laid down, and there might possibly arise such a case wherein a party might be justified, although deceased was unarmed. But a person ought not to make any mistake or error in regard to the meaning of such demonstrations or movements of his adversary. In nearly every case the defendant or his friends testify that the deceased threw his hands behind him, and this bare fact seems to be enough to cause juries to rush with jubilant feet to the rescue of the murderer.

* * * Now, as you jurors are the exclusive judges of the credibility of witnesses, it is for you to say that when a defendant has murdered a helpless, unarmed man, and he offers proof, by himself or his friends, that although the deceased had no weapons himself, and although he knew that the defendant was himself armed, yet he (deceased) actually threw his hands behind him as if to draw a pistol, which he did not have and never had, and advanced on the armed defendant to certain death,—it is for you to say whether or not such testimony is true or false. If I was a juror, I should, without hesitation, say that such testimony was manufactured, and I should promptly disregard it. I wish to call your attention particularly to the doctrine of reasonable doubt, which is also so often used with such powerful effect in all criminal trials. Our courts have said that reasonable doubt is that state of a case which, after a full consideration of all the evidence, leaves the jury without an abiding conviction, to a moral certainty, of the truth of the accusation against the defendant. It must not be merely specu-

lative, imaginary, possible, or conjectural, but it must be a real doubt, arising out of the whole case. In presenting the theory of a reasonable doubt to the jury, attorneys nearly always conclude their argument with the old maxim that it is better that ninety and nine guilty men should be acquitted than that one innocent man should be convicted. Now, that may be an ancient maxim of the law books, assuming an ethical preference for turning loose many criminals rather than injuring one innocent suspect, but the larger truth, however, is that society and civilization are built upon the sacrificial bones of harmless individuals necessarily offered up for the good of the many."

Defendant was not present when this lecture was read to the jury. His counsel were, however, and at each reading excepted.

This charge was severely condemned in *Jones v. State* (Tex. Cr. App.) 51 S. W. 949; and *Attaway v. State* 41 Tex. Cr. R. 395, 55 S. W. 45, was reversed because of its being read to the jurors in advance of their selection to try that case. It is not readily perceived why a trial court will insist on ingrafting novel errors upon charges, injurious in their nature, and violative of our criminal jurisprudence. Under our procedure, a defendant has the right to be present when the jury is charged, when the witnesses are examined, when the jury is discharged, and when many other steps are taken during his trial. *Bell v. State*, 32 Tex. Cr. R. 436, 24 S. W. 418; *Cline v. State*, 36 Tex. Cr. R. 320, 36 S. W. 1099, 37 S. W. 722; *Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717; *Upchurch v. State*, 36 Tex. Cr. R. 624, 38 S. W. 206; *Hill v. Same*, 41 Tex. 255; *Mapes v. State*, 13 Tex. App. 85; *Benavides v. State*, 31 Tex. Cr. R. 173, 20 S. W. 369; *Shipp v. State*, 11 Tex. App. 46; *Granger v. State*, 11 Tex. App. 454.

Article 715, Code Civ. Proc. provides: "After the argument in a criminal case has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not."

Article 716 provides "It is beyond the province of a judge sitting in criminal cases to discuss the facts, or use any argument in his charge calculated to rouse the sympathy or excite the passions of a jury. It is his duty to state plainly the law of the case."

These articles were enacted for the government of trial courts. They were intended to be strictly observed, and not covertly violated. A casual inspection of the excerpt quoted shows a palpable violation of almost every provision of said articles. If this charge had been given the jury as the law of the case, the conviction, of course, could not stand. It is a severe criticism, animadversion, and denunciation of the law of self-defense and reasonable doubt. These wise provisions of the law and of our criminal jurisprudence are severely arraigned as being subversive of justice and right. Whether or not the trial court believed in the wisdom of these safeguards of human life and liberty, it was incumbent on him, as it was his duty to observe them. These principles of our law are binding upon trial courts; must be respected, adhered to, and enforced. In the charge given the jury after the conclusion of the argument, the

court correctly stated the law of reasonable doubt, but that given before the trial is plainly violative of all law. The charges are directly antagonistic, and cannot both be correct. The law of apparent danger, as far as given by the court, was fairly presented, whereas, in the charge given the jury in advance, it was criticised, and held up to ridicule and contempt, as affording a subterfuge and an excuse for acquitting guilty parties. The law of apparent danger (a very necessary part of the charge, under the evidence) was sharply criticised in advance by this address to the petit jurors, and in part omitted from the charge given after the argument. Illustrative of this, evidence of threats, and accompanying acts of deceased, manifesting an intention to execute such threats, was in testimony, and yet the court failed to instruct on the law applicable to this phase of the evidence. It was clearly the duty of the court to have given the jury an instruction with reference to such threats, viewed in the light of the demonstration testified to have been made by deceased at the time of the difficulty, as if to draw a pistol. An exception was reserved to this omission. This was not only error, but an error sharply intensified when viewed in the light of the lecture given the jury, urging them to disregard this character of defense. It is to be deplored that this court should be called upon again to reverse a judgment under such state of case. There is no warrant of law for such practice. Besides, the charge is clearly wrong.

Exceptions were reserved to the court's action while impaneling the jury in regard to this same matter. Several jurors who were summoned upon the special venire for the trial of appellant heard this charge, and testified to its injurious effect upon their minds. It is unnecessary, however, to go into a discussion of these exceptions, because of the reversal of the judgment upon matters already discussed. Such errors will not occur upon another trial. For the reasons stated, the judgment is reversed, and the cause remanded.

HENDERSON, J. (dissenting). This case was reversed by my Brethren, evidently because of a charge read by the court, not in this case, but on the impanelment of petit juries for the several weeks of court, from which the special venire in this case was drawn, though the opinion also suggests that the court should have given appellant's requested instruction on communicated threats in connection with self-defense. Possibly it was intended to base the reversal on both of said grounds. I have previously stated my views in regard to a charge of this character. See *Attaway v. State*, 41 Tex. Cr. R. 395, 55 S. W. 45. Concede, however, that the charge here complained of, in its criticism of the defense of apparent danger and reasonable doubt, was a disparagement of such defenses, and an enunciation of incorrect legal principles, yet I fail to see how said charge could possibly have operated to the injury of appellant. As stated before, said charge was not read to the jury on the trial of this case, but had previously been read on the impanelment of petit juries for the several weeks of the term of court. It is true, some of the special veniremen heard the charge read; but they were all examined as to this matter, and each of them stated on oath that he would be governed in the trial of the case by

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the charge given by the court in the case, and, if there was any antagonism in the principles announced in the charge previously read by the judge and the one given them in the case, that they would not be governed by that, but by the charge given in the case. More than this, I have been unable to discover in this record any communicated threats. I fail to see in the circumstances attending the homicide any apparent danger. Indeed, there is no self-defense in the case. The only real defense was that it was manslaughter, because of alleged previous insulting conduct of deceased towards the wife of appellant. Aside from this, the case is presented without any extenuating circumstances. Appellant was seeking deceased for the purpose of killing him, rode up behind him, and shot him in the back. Appellant himself testified (and this is all the evidence, so far as I am advised from the record, as to any demonstration) that: When he rode up, "Harshaw was on horseback, had his hand to his side, and jerked round. I killed Harshaw because he made that demonstration, and was on that road that morning. I do not know if I would have killed him if he had not made that demonstration." Again he says: "I was paying no attention. If Harshaw had a gun or a cannon, it was all the same to me. Harshaw was going along that road in front of me. I did not lope. I trotted right along. I had to overtake him." And again he says: "I did not go there for no good purpose. I expected to have a fight. I had been informed of it, and went there fixed for it. When I saw Harshaw first, he was probably 100 yards ahead of me. I was going faster than he." From other witnesses we are informed, in consonance with appellant's own testimony, that appellant on that morning was seeking deceased; that when he saw him he pursued and overtook him, and shot him in the back. According to the declarations of deceased, appellant shot before he saw him. This is the character of self-defense proved. The court gave a charge on self-defense which was correct. But appellant was not entitled, according to my view, to a charge on this subject at all; and, if the court had committed an error in the charge, it would not have been to his injury. To say, then that some expressions of the court on some other occasion, in charging the petit juries or the grand jury, or a charge in some other case, because it may have been erroneous, as announcing incorrect legal principles, should be cause for reversing this case does not occur to me to be sound doctrine. Even an erroneous charge, given in the case, on self-defense would not have been hurtful to appellant, because he was not entitled to a charge on that subject. According to my view, the jury gave credence to the only defense appellant had, which was manslaughter, and I believe the judgment ought to be affirmed.

(Continuation of notes, by J. F. G.)—In the above cases, Judge Thompson may have been prompted by an honest desire to attain what he deemed the ends of justice. It may have been that homicides were of frequent occurrence in his locality and too frequently followed by acquittals; but that is no justification for his ante-trial addresses, tending to prejudice the jurors against persons about to be tried on charges of crime. Jurors are generally disposed to enforce the law, and too often presume guilt instead of innocence. As a general rule, they do not need any prompting

from the bench against the accused, but rather advice against forming hasty conclusion against him. A homicide is generally followed by newspaper comments, which accentuate its sensational features, and inflames the public mind. As, with tenacity each individual clings to life, so with the community at large, life is sacred, and human nature is shocked by the report of a violent death. The first impressions are generally deep, forming a lasting prejudice against the person who is accused of depriving society of one of its members.

Trial by jury—The trial by jury comes to us from remote antiquity. It has withstood the reign of tyrants, survived the overthrow of dynasties, refuted the criticisms of its enemies and remains as one of the best expressions of free government by the people in their original and sovereign capacity.

Executive, judicial, and ministerial officers and members of legislative assemblies generally are to some degree influenced by party prejudices, ties of friendship, public sentiment, or ambition; but jurors, not self-nominated, assume an humbler, but more independent function. Jurors are summoned from the community at large; come together as strangers to each other, and to the parties litigant; have no rivals seeking to unseat them; have neither desire nor opportunity to extend their term of public service; their duties are those of the ordinary citizen, often performed at a sacrifice; their remuneration is meager; they are actuated alone by a desire to accomplish justice; they assemble today; perform their public service; disperse tomorrow and disappear from the public gaze.

The trial by jury also is termed "trial by the country;" for, in contemplation of law, the jury represents the country. In civil cases, the parties having certain fixed rights under the law, the jury only passes upon the evidence and must take the law as the judge states it in his instructions; but, in criminal cases, the prosecution being one for an alleged offense against the country, the jury, as the country itself, may construe the law and acquit the accused contrary to the instruction of the judge. Many are the cases when it becomes the duty of the jury to do so. Judges are not infallible in their constructions of the law; reaches of the law often are technical or trifling and not deserving of punishment; misfortune is frequently regarded as crime; and were it not for this humane and wise doctrine, the law itself would assume the character of a fierce monster, ready to do the bidding of a malicious prosecutor or an arrogant judge.

In criminal cases, are jurors by virtue of the common law, judges of the law as well as of the facts? This question has perplexed many judicial minds. Their answers are not uniform.

In *State v. Croteau*, 23 Vt. 14, 1 Leading Criminal Cases, (2nd Ed.) 363, the court held that they were; but a strong dissenting opinion was filed by Mr. Justice Redfield, which was afterwards revised by him as editor of Leading Criminal Cases. Judge Redfield contended, that at common law, jurors in criminal cases, were not judges of the law; but that they simply had the power to return a verdict of not guilty contrary to the instructions of the court. This is practically the same view taken by the Supreme Court of Michigan in *Hamilton v. People* 20 Mich. 173, 1 American Criminal Report 618.

Unwarranted action of judges in reprimanding jurors for returning verdicts of not guilty—Condemnatory resolutions by the Chicago Bar Association.—Notwithstanding the fact, that, reposing superior confidence in jurors, the law prohibits judges from passing on the question of guilt or innocence in felony cases, frequently, during the past few years, have judges been known to reprimand jurors for returning verdicts of not guilty, and, even to discharge them from further service. On several occasions these erratic and unwarranted displays of judicial indiscretion were approvingly written up by enterprising Chicago newspaper reporters. Accepting newspaper reports as public indorsement, several Cook County judges continued the practice until an unusually severe reprimand by Judge Barnes, followed by the discharge of the jurors without pay, resulted in action by the Chicago Bar Association at its annual meeting on November 25, 1905, and the adoption of a condemnatory resolution. The resolution was introduced by Mr. Stephen S. Gregory, a gentleman of high professional standing, noted for his learning, ability, refinement and keen sense of justice. The resolution was as follows:

"RESOLVED, That it has come to the knowledge of the Association that sometimes where a verdict of acquittal in a criminal case has been returned in the Criminal Court of this county, the presiding judge has severely censured the jurors from the bench, for their verdict and sometimes discharged them from further service.

"Deeming it highly expedient to put on record their views as to this matter, the members of the Chicago Bar Association do hereby resolve that in their judgment this practice is illegal and unconstitutional.

"Under our system a judge in criminal matters has no right nor authority to criticise or censure jurors when they acquit. Any attempt to do this is a menace to the integrity of trial by jury and the independence of jurors, which it is the duty of the Bar to condemn promptly and to resist vigorously."

Two historic trials, in which triumphs in the march of freedom were attained by independent and courageous jurors—Trial of William Penn and William Mead in London in 1670 for street preaching—Trial of John Peter Zenger in New York City on August 4, 1735.—Address of Honorable Henry C. Caldwell, United States Circuit Judge, on "TRIAL BY JUDGE AND JURY."—

William Penn, the founder of the Commonwealth of Pennsylvania, together with William Mead, both quakers, were tried in London in 1670 on a charge of unlawful assembly, etc., i. e., *street preaching*. The presiding judges from the start of the trial manifested strong prejudices against the defendants and at the conclusion of the trial the jurors were directed to return a verdict of guilty,—the instructing judge, telling the jury,—*to observe what was fully sworn to at their peril*. The jurors declining to return a verdict against the defendants, were kept in close confinement for several days, in the mean time being subjected to abuse and indignities. Finally they returned an unqualified verdict of not guilty, as to each defendant. This verdict was received, but the jurors were

fined forty marks apiece. One of the jurors obtained a writ of *habeas corpus* and was discharged by Chief Justice Vaughn upon the ground that it was unlawful to fine a juror for returning a verdict contrary to the directions of the court. The decision of Chief Justice Vaughn has been considered a land mark in the road of progress. It is reported at page 135 of Vaughn's Reports; also, 6 Howell State Trials 999. We incorporate in these notes a report of the trial of Penn and Mead, copied from 6 Howell's State Trials, pages 951 to 970. It is said that the report was written by Penn and Mead themselves; but the well known integrity of William Penn recommends it as an authentic statement of facts.

On August 4, 1735,* John Peter Zenger was brought to trial in the City of New York upon an information filed by the Attorney General, two grand juries having refused to indictment him. He was charged with libeling the Colonial Governor of New York. At a previous call of the case, Mr. Zenger's attorneys were dis-barred and another attorney appointed to defend him. Friends secured the assistance of Andrew Hamilton of Philadelphia, then about eighty years of age, a lawyer who had been educated and admitted to the bar in England, and, had become one of the most distinguished members of the American Bar. From a report of the trial, published in 1765, which the writer has recently secured, it appears that Mr. Hamilton was treated with rudeness by the court, and, during his argument was threatened with prosecution by the Attorney General, who followed Mr. Hamilton, with a harangue for conviction. The court instructed the jury to find the defendant guilty; but the jury very properly disregarding the instructions, returned a verdict of not guilty. In a very able address before the Missouri State Bar Association, the Honorable Henry C. Caldwell, gave a brief account of this historic case. We will incorporate in these notes, Judge Caldwell's Address, up to and including the account of the trial, as we get it from The Kansas City Bar Monthly of April, 1899.

TRIAL OF WILLIAM PENN AND WILLIAM MEAD.

6 Howell's State Trials 951.

A. D. 1670.

PRESENT, Sam. Starling, mayor; Tho. Howell, recorder; Tho. Bludworth, William Peak, John Robinson, Richard Ford, and Joseph Shelden, aldermen; John Smith and James Edwards, sheriffs; and Richard Brown.

Cryer. "O Yes! Thomas Veer, Edward Bushel, John Hammond, Charles Milson, Gregory Walklet, John Brightman, William Plumsted, Henry Henley, Thomas Damask, Henry Michel, William Lever, John

*From the report of the case in our possession, it appears that the trial was on August 4th; but from the letter of Mr. Erb, at the end of these notes, it would appear that the jury was sworn on July 29th.

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Baily, you shall well and truly try, and true deliverance make betwixt our sovereign lord the king, and the prisoners at the bar, according to your evidence. So help you God."

The indictment sets forth, "That William Penn, Gent. and William Mead, late of London, linen draper, with divers other persons to the jurors unknown, to the number of 300, the 14th day of August in the 22d year of the king, about eleven of the clock in the forenoon, the same day with a force and arms, Etc. in the parish of St. Bennet Grace-church in Bridge-ward, London, in the street called Grace-church street, unlawfully and tumultuously did assemble and congregate themselves together, to the disturbance of the peace of the said lord the king and the aforesaid William Penn and William Mead, together with other persons to the jurors aforesaid unknown, then and there so assembled and congregated together; the aforesaid William Penn by agreement between him and William Mead before made, and by abetment of the aforesaid William Mead, then and there, in the open street, did take upon himself to preach and speak, and then and there did preach and speak unto the aforesaid William Mead, and other persons there, in the street aforesaid, being assembled and congregated together, by reason whereof a great concourse and tumult of people in the street aforesaid, then and there, a long time did remain and continue, in contempt of the said lord the king, and of his law, to the great disturbance of his peace; to the great terror and disturbance of many of his liege people and subjects, to the ill example of all others in the like case offenders, and against the peace of the said lord the king, his crown and dignity."

What say you, William Penn and William Mead, are you Guilty as you stand indicted, in the manner and form, as aforesaid, or Not Guilty?

Penn. It is impossible that we should be able to remember the Indictment verbatim, and therefore we desire a copy of it, as is customary on the like occasions.

Recorder. You must first plead to the indictment before you can have a copy of it.

Penn. I am unacquainted with the formality of the law, and therefore before I shall answer directly, I request two things of the Court. 1. That no advantage may be taken against me, nor I deprived of any benefit, which I might otherwise have received. 2. That you will promise me a fair hearing, and liberty of making my defense.

Court. No advantage shall be taken against you; you shall have liberty; you shall be heard.

Penn. Then I plead Not Guilty in manner and form.

Clerk. What sayest thou, William Mead, art thou Guilty in manner and form, as thou standest indicted, or Not Guilty?

Mead. I shall desire the same liberty as is promised William Penn.

Court. You shall have it.

Mead. Then I plead not guilty in manner and form.

The Court adjourned until the afternoon.

Crier. O Yes, etc.

Clerk. Bring William Penn and William Mead to the bar.

Obser. The said Prisoners were brought, but were set aside and other

business prosecuted. Where we cannot choose but observe, that it was the constant and unkind practices of the court to the prisoners to make them wait upon the trials of felons and murderers, thereby designing, in all probability, both to affront and tire them.

After five hours attendance, the court broke up and adjourned to the third instant.

The 3d of September, 1670, the court sat.

Crier. O Yes, etc.

Clerk. Bring William Penn and William Mead to the bar.

Mayor. Sirrah, who bid you put off their hats? Put on their hats again.

Obser. Whereupon one of the officers putting the prisoners hats upon their heads (pursuant to the order of the court) brought them to the bar.

Record. Do you know where you are?

Penn. Yes.

Record. Do you not know it is the king's court?

Penn. I know it to be a court, and I suppose it to be the king's court.

Record. Do you not know there is respect due to the court?

Penn. Yes.

Record. Why do you not pay it then?

Penn. I do so.

Record. Why do you not pull off your hat then?

Penn. Because I do not believe that to be any respect.

Record. Well, the court sets forty marks a piece upon your heads, as a fine for your contempt of the court.

Penn. I desire it might be observed, that we came into the court with our hats off (that is, taken off) and if they have been put on since, it was by order from the bench; and therefore not we, but the bench should be fined.

Mead. I have a question to ask the Recorder: am I fined also?

Recorder. Yea.

Mead. I desire the Jury, and all people to take notice of this injustice of the recorder. Who spake to me to pull off my hat? and yet hath he put a fine upon my head. O fear the Lord and dread his power, and yield to the guidance of his holy spirit for he is not far from every one of you.

The Jury sworn again.

Obser. J. Robinson, lieutenant of the Tower, disingenuously objected against Edward Bushel, as if he had not kissed the book, and therefore would have him sworn again; though indeed it was on purpose to have made use of his tenderness of conscience in avoiding reiterated oaths, to have put him by his being a jurymen apprehending him to be a person not fit to answer their arbitrary ends.

The Clerk read the Indictment, as aforesaid.

Clerk. Crier, call James Cook into the court, give him his oath.

Clerk. James Cook, lay your hand upon the book: "The evidence you shall give to the court, betwixt our sovereign the king, and the

prisoners at the bar, shall be the truth, and the whole truth and nothing but the truth. So help you God."

Cook. I was sent for, from the exchange, to go and disperse a meeting in Gracechurch-Street where I saw Mr. Penn speaking to the people, but I could not hear what he said because of the noise: I endeavoured to make way to take him, but I could not get to him for the crowd of people; upon which Capt. Mead came to me, about the kennel of the street and desired me to let him go on; for when he had done, he would bring Mr. Penn to me.

Court. What number do you think might be there?

Cook. About three or four hundred people.

Court. Call Richard Read, give him his oath.

Read being sworn, was asked, What do you know concerning the prisoners at the bar?

Read. My lord, I went to Gracechurch-Street, where I found a great crowd of people, and I heard Mr. Penn preach to them; and I saw Capt. Mead speaking to lieutenant Cook, but what he said, I could not tell.

Mead. What did William Penn say?

Read. There was such a great noise, that I could not tell what he said.

Mead. Jury, observe this evidence, he saith he heard him preach, and yet saith, he does not know what he said.

Jury take notice, he swears now a clean contrary thing to what he swore before the mayor when we were committed; for now he swears that he saw me in Gracechurch Street, and yet swore before the mayor, when I was committed that he did not see me there. I appeal to the mayor himself, if this be not true. But no answer was given.

Court. What number do think might be there?

Read. About four or five hundred.

Penn. I desire to know of him what day it was.

Read. The 14th day of August.

Penn. Did he speak to me, or let me know he was there? for I am very sure I never saw him.

Clerk. Crier, call — into the court.

Court. Give him his oath.

— My Lord, I saw a great number of people, and Mr. Penn I suppose, was speaking; I saw him make a motion with his hands, and heard some noise, but could not understand what he said. But for Capt. Mead, I did not see him there.

Rec. What say you Mr. Mead, were you there?

Mead. It is a maxim in your own law, 'Nemo tenetur accusare seipsum' which if it be not true Latin, I am sure it is true English, 'That no man is bound to accuse himself.' And why dost thou offer to insnare me with such a question? Doth not this show thy malice? Is this like unto a judge, that ought to be counsel for the prisoner at the bar?

Rec. Sir, hold your tongue, I did not go about to insnare you.

Penn. I desire we may come more close to the point, and that silence be commanded in the court.

Crier. O yes, all manner of persons keep silence upon pain of imprisonment. Silence in the court.

Penn. We confess ourselves to be so far from recanting or declining to vindicate the assembling of ourselves to preach pray or worship the Eternal, Holy, Just God, that we declare to all the world, that we do believe it to be our indispensible duty, to meet incessantly upon so good an account; nor shall all the powers upon earth be able to divert us from reverencing and adoring our God who made us.

Brown. You are not here for worshipping God, but for breaking the law; you do yourselves a great deal of wrong in going on in that discourse.

Penn. I affirm I have broken no law, nor am I Guilty of the indictment that is laid to my charge; and to the end of the bench, the jury, and myself, with these that hear us, may have a more direct understanding of this procedure, I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.

Rec. Upon the common-law.

Penn. Where is that common-law?

Rec. You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.

Penn. This answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.

Rec. Sir, will you plead to your indictment?

Penn. Shall I plead to an Indictment that hath no foundation in law? If it contain that law, you say I have broken, why should you decline to produce that law, since it will be impossible for the jury to determine, or agree to bring in their verdict, who have not the law produced, by which they should measure the truth of this indictment, and the guilt, or contrary of my fact?

Rec. You are a saucy fellow, speak to the Indictment.

Penn. I say, it is my place to speak to matter of law; I am arraigned a prisoner; my liberty, which is next to life itself, is now concerned: you are many mouths and ears against me, and if I must not be allowed to make the best of my case, it is hard, I say again, unless you shew me, and the people, the law you ground your indictment upon, I shall take it for granted your proceedings are merely arbitrary.

Obser. At this time several upon the Bench urged hard upon the Prisoner to bear him down.

Rec. The question is, whether you are Guilty of this Indictment?

Penn. The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.

Rec. You are an impertinent fellow, will you teach the court what law is? It is 'Lex non scripta,' that which may have studied 30 or 40 years to know, and would you have me to tell you in a moment?

Penn. Certainly, if the common law be so hard to be understood, it is far from being very common; but if the lord Coke in his Institutes be of any consideration, he tells that Common-Law is common right, and that Common Right is the Great Charter-Privileges; confirmed 9 Hen. 3, 29, 25 Edw. 1, 12, Ed. 3, 3 Coke Instit. 2 p. 56.

Rec. Sir, you are a troublesome fellow, and it is not for the honor of the court to suffer you to go on.

Penn. I have asked but one question, and you have not answered me; though the rights and privileges of every Englishman be concerned in it.

Rec. If I should suffer you to ask questions till to-morrow morning, you would be never the wiser.

Penn. That is according as the answers are.

Rec. Sir, we must not stand to hear you talk all night.

Penn. I design no affront to the court, but to be heard in my just plea; and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.

Rec. Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do anything to-night.

Mayor. Take him away, take him away, turn him into the bale-dock.

Penn. These are but so many vain exclamations; is this justice or true judgment? Must I therefore be taken away because I plead for the fundamental laws of England? However, this I leave upon your consciences, who are of the jury (and my sole judges) that if these ancient fundamental laws, which relate to liberty and property (and are not limited to particular persuasions in matters of religion) must not be indispensably maintained and observed, who can say he hath right to the coat upon his back? Certainly, our liberties are openly to be invaded, our wives to be ravished, our children slaved, our families ruined, and our estates led away in triumph, by every sturdy beggar and malicious informer, as their trophies, but our (pretended) forfeits for conscience sake. The Lord of Heaven and Earth will be judge between us in this matter.

Rec. Be silent there.

Penn. I am not to be silent in a case wherein I am so much concerned, and not only myself, but many ten thousand families besides.

Obser. They having rudely haled him into the Bale-dock, William Mead they left in court, who spake as followeth:

Mead. You men of the jury, here I do now stand, to answer to an Indictment against me, which is a bundle of stuff full of lies and falsehoods; for therein I am accused that I met 'vi & armis illicite & tumultuose:' time was when I had freedom to use a carnal weapon, and then I thought I feared no man; but now I fear the living God, and dare not make use thereof nor hurt any man; nor do I know I demeaned myself as a tumultuous person; I say I am a peaceable man, therefore

it is a very proper question that William Penn demanded in this case, anoyer of the law, on which our Indictment is grounded.

Rec. I have made answer to that already.

Mead, turning his face to the jury, saith, You men of the jury who are my judges, if the Recorder will not tell you what makes a riot, a rout, or an unlawful assembly, Coke, he that once they called the lord Coke, tells us what makes a riot, a rout and an unlawful assembly. A riot is when three or more, are met together to beat a man, or to enter forcibly into another man's land, to cut down his grass, his wood or break down his pales.

Obser. Here the recorder interrupted him, and said 'I thank you sir, that you will tell me what the law is,' scornfully pulling off his hat.

Mead. Thou mayest put on thy hat, I have never a fee for thee now.

Brown. He talks at random, one while an independent, another while, some other religion, and now a quaker, and next a papist.

Mead. 'Turpe est doctori cum culpa redarguit ipsum.'

May. You deserve to have your tongue cut out.

Rec. If you discourse on this manner, I shall take occasion against you.

Mead. Thou didst promise me I should have fair liberty to be heard? why may I not have the privilege of an Englishman? I am an Englishman, and you might be ashamed of this dealing.

Rec. I look upon you to be an enemy to the laws of England which ought to be observed and kept, nor are you worthy of such privileges as others have.

Mead. The Lord is judge between me and thee in this matter.

Obser. Upon which they took him away into the Bale-dock and the Recorder proceeded to give the Jury their charge as followeth:

Recorder. You have heard what the Indictment is, It is for preaching to the people, and drawing a tumultuous company after them, and Mr. Penn was speaking; if they should not be disturbed you see they will go on; there are three or four witnesses that have proved this, that he did preach there; that Mr. Mead did allow of it: after this, you have heard by substantial witnesses what is said against them; now we are upon the matter of fact, which you are to keep to, and observe, as what hath been fully sworn at your peril.

Obser. The prisoners were put out of the court into the Bale-dock and the charge given to the jury in their absence, at which W. Penn with a very raised voice, it being a considerable distance from the bench, spake:

Penn. I appeal to the jury who are my Judges and this great assembly, whether the proceedings of the court are not most arbitrary and void of all law, in offering to give the jury their charge in the absence of the prisoners; I say it is directly opposite to, and destructive of the undoubted right of every English prisoner, as Coke, in the 2 instit. 29 on the chap. of Magna Charta.

Obser. The Recorder being thus unexpectedly lashed for his extra judicial procedure, said with an enraged smile,

Rec. Why, ye are present, you do hear, do you not?

Penn. No thanks to the court that commanded me into the Bale-dock;

and you of the jury, take notice, that I have not been heard, neither can you legally depart the Court before I have been fully heard, having at last ten or twelve material points to offer, in order to invalidate their Indictment.

Rec. Pull that fellow down, pull him down.

Mead. Are these according to the rights and privileges of Englishmen, that we should not be heard, but turned into the Bale-dock, for making our defence, and the jury to have their charge given them in our absence? I say these are barbarous and unjust proceedings.

Rec. Take them away into the Hole; To hear them talk all night as they would, that I think doth not become the honor of the court and I think you (i. e. the jury) yourselves would be tired out, and not have patience to hear them.

Obser. The Jury were commanded up to agree upon their verdict, the prisoners remaining in the stinking hole. After an hour and a half's time eight came down agreed, but four remained above; the court sent an officer for them, and they accordingly came down. The Bench used many unworthy threats to the four that dissented; and the Recorder, addressing himself to Bushel, said 'Sir, you are the cause of this disturbance, and manifestly shew yourself an abettor of faction. I shall set a mark upon you, Sir.'

J. Robinson. Mr. Bushel, I have known you near this 14 years; you have thrust yourself upon this jury, because you think there is some service for you; I tell you, you deserve to be indicted more than any man that hath been brought to the bar this day.

Bushel. No, sir John, there were threescore before me, and I would willingly have got off, but could not.

Bloodw. I said, when I saw Mr. Bushel, what I see is come to pass, for I knew he would never yield. Mr. Bushel, we know what you are.

May. Sirrah, you are an impudent fellow, I will put a mark upon you.

Obser. They used much menacing language, and behaved themselves very imperiously to the jury, as persons not more void of justice than sober education; after this barbarous usage, they sent them to consider of bringing in their verdict and after some considerable time they returned to the Court. Silence was called for, and the jury called by their names.

Cler. Are you agreed upon your verdict?

Jury. Yes.

Cler. Who shall speak for you?

Jury. Our Foreman.

Clerk. Look upon the prisoners at the bar; how say you? Is William Penn Guilty of the matter whereof he stands indicted in manner and form, or Not Guilty?

Foreman. Guilty of speaking in Grace-church Street.

Court. Is that all?

Foreman. That is all I have in commission.

Rec. You had as good as say nothing.

May. Was it not an unlawful assembly? You mean he was speaking to a tumult of people there?

Foreman. My Lord, This is all I had in commission.

Obser. Here some of the jury seemed to buckle to the questions of the Court; upon which, Bushel, Hammond, and some others, opposed themselves, and said they allowed of no such word as an unlawful assembly in their Verdict; at which the Recorder, Mayor, Robinson and Bloodworth took great occasion to villify them with most opprobrious language; and this verdict not serving their turns, the Recorder expressed himself thus:

Rec. The law of England will not allow you to part till you have given your Verdict.

Jury. We have given in our Verdict, and we can give in no other.

Rec. Gentlemen, you have not given in your Verdict, and you had as good say nothing; therefore go and consider it once more, that we may make an end of this troublesome business.

Jury. We desire we may have pen, ink, and paper.

Observer. The Court adjourned for half an hour; which being expired, the Court returns, and the Jury not long after.

The Prisoners were brought to the bar, and the Jury's names called over.

Clerk. Are you agreed of your Verdict?

Jury. Yes.

Clerk. Who shall speak for you?

Jury. Our Foreman.

Clerk. What say you? Look upon the prisoners; Is William Penn Guilty in manner and form, as he stands indicted, or Not Guilty.

Foreman. Here is our Verdict; holding forth a piece of paper to the clerk of the peace, which follows:

"We the jurors, hereafter named, do find William Penn to be Guilty of speaking or preaching to an assembly, met together in Gracechurch-Street, the 14th of August last, 1670. And that William Mead is Not Guilty of the said Indictment." Foreman Thomas Veer, Edward Bushel, John Hammond, Henry Henley, Charles Milson, Gregory Walklet, John Baily, William Lever, Henry Michel, John Brightman, James Damask, Wil. Plumsted.

Obser. This both Mayor and Recorder resented at so high a rate, that they exceeded the bounds of all reason civility.

Mayor. What, will you be led by such a silly fellow as Bushel? an impudent canting fellow? I warrant you, you shall come no more upon juries in haste: you are a foreman indeed, addressing himself to the foreman, I thought you had understood your place better.

Recorder. Gentlemen, you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire and tobacco; you shall not think thus to abuse the court; we will have a verdict, by the help of God, or you shall starve for it.

Penn. My jury, who are my judges, ought not to be thus menaced; their verdict should be free, and not compelled; the bench ought to wait upon them, but not forestal them. I do desire that justice may be done me, and that the arbitrary resolves of the bench may not be made the measure of my jury's verdict.

Recorder. Stop that prating fellow's mouth, or put him out of the court.
 Mayor. You have heard that he preached, that he gathered a company of tumultuous people, and that they do not only disobey the martial power, but civil also.

Penn. It is a great mistake; we did not make the tumult, but they that interrupted us: The jury cannot be so ignorant as to think, that we met there, with a design to disturb the civil peace, since (1st) we were by force of arms kept out of our lawful house, and met as near it in the street as their soldiers would give us leave; and (2ndly) because it was no new thing (nor with the circumstances expressed in the indictment) but what was usual and customary with us; it is very well known that we are a peaceable people, and cannot offer violence to any man.

Obser. The court being ready to break up, and willing to huddle the prisoners to their goal and the jury to their chamber, Penn spoke as follows:

Penn. The agreement of 12 men is a verdict in law, and such a one being given by the jury, I require the clerk of the peace to record it, as he will answer it at his peril. And if the jury bring in another verdict contradictory to this, I affirm they are purjured men in law. And looking upon the jury, said You are Englishmen, mind your privilege, give not away your right.

Bush. Etc. Nor will we ever do it.

Obser. One of the jury-men pleaded indisposition of body, and therefore desired to be dismissed.

Mayor. You are as strong as any of them; starve them; and hold your principles.

Recorder. Gentlemen, You must be contented with your hard fate, let your patience overcome it; for the court is resolved to have a verdict, and that before you can be dismissed.

Jury. We are agreed, we are agreed, we are agreed.

Obser. The court swore several persons, to keep the Jury all night without meat, drink, fire or any other accommodations; they had not so much as a chamber-pot, though desired.

Crier. O Yes, etc.

Obser. The court adjourns till 7 of the clock next morning (being the 4th instant, vulgarly called Sunday, at which time the prisoners were brought to the bar: The court sat, and the Jury called to bring in their verdict.

Crier. O Yes, Etc.—Silence in the court upon pain of imprisonment.

The Jury's names called over.

Clerk. Are you agreed upon your verdict?

Jury. Yes.

Clerk. Who shall speak for you?

Jury. Our Foreman.

Clerk. What say you? Look upon the prisoners at the bar; is William Penn guilty of the matter whereof he stands indicted in manner and form as aforesaid, or Not Guilty?

Foreman. William Penn is Guilty of speaking in Gracechurch-Street.
Mayor. To an unlawful assembly?

Bush. No, my lord, we give no other verdict than what we gave last night; we have no other verdict to give.

Mayor. You are a factious fellow, I'll take a course with you.

Blood. I knew Mr. Bushel would not yield.

Bush. Sir Thomas, I have done according to my conscience.

Mayor. That conscience of yours would cut my throat.

Bush. No, my lord, it never shall.

Mayor. But I will cut yours so soon as I can.

Recorder. He has inspired the jury; he has the spirit of divination, methinks I feel him; I will have a positive verdict, or you shall starve for it.

Penn. I desire to ask the Recorder one question, Do you allow of the verdict given of William Mead?

Recorder. It cannot be a verdict, because you were indicted for a conspiracy, and one being found Not Guilty, and not the other, it could not be a verdict.

Penn. If Not Guilty be not a verdict, then you make of the jury and Magna Charta but a mere nose of wax.

Mead. How! is Not Guilty no verdict?

Rec. No, it is no Verdict.

Penn. I affirm, that the consent of a jury is a Verdict in law; and if William Mead be Not Guilty, it consequently follows, that I am clear since you have indicted us of a conspiracy, and I could not possibly conspire alone.

Obser. There were many passages, that could not be taken, which past between the Jury and the Court. The Jury went up again, having received a fresh charge from the Bench, if possible to extort an unjust Verdict.

Cry. O Yes, Etc. Silence in the Court.

Court. Call over the Jury. Which was done.

Clerk. What say you? Is William Penn Guilty of the matter whereof he stands indicted in manner and form aforesaid or not Guilty?

Forem. Guilty of speaking in Cracechurch-street.

Rec. What is this to the purpose? I say, I will have a verdict. And speaking to Edw. Bushel, said You are a factious fellow; I will set a mark upon you; and whilst I have anything to do in the city, I will have an eye upon you.

Mayor. Have you no more wit than to be led by such a pitiful fellow? I will cut his nose.

Penn. It is intolerable that my jury should be thus menaced. Is this according to the fundamental laws? Are not they my proper judges by the Great Charter of England? What hope is there of ever having justice done, when juries are threatened, and their verdicts rejected? I am concerned to speak, and grieved to see such arbitrary proceedings. Did not the lieutenant of the Tower render one of them worse than a felon? And do you not plainly seem to condemn such a factious fellows, who answer not your ends? Unhappy are those juries, who are threat-

ened to be fined, and starved, and ruined, if they give not in Verdicts contrary to their consciences.

Rec. My lord, you must take a course with that same fellow.

Mayor. Stop his mouth; gaoler, bring fetters, and stake him to the ground.

Penn. Do your pleasure, I matter not your fetters.

Rec. Till now, I never understood the reason of the policy and prudence of the Spaniards, in suffering the inquisition among them: And certainly it will never be well with us, till something like unto the Spanish inquisition be in England.

Obser. The jury being required to go together to find another Verdict, and stedfastly refusing it (saying they could give no other Verdict than what was already given) the Recorder in great passion was running off the bench, with these words in his mouth 'I protest I will sit here no longer to hear these things' at which time the Mayor calling, Stay, stay, he returned, and directed himself unto the Jury, and spoke as followeth:

Rec. Gentlemen, we shall not be at this trade always with you: you will find the next sessions of parliament there will be a law made, that those that will not conform shall not have the protection of the law. Mr. Lee, draw up another Verdict, that they may bring it in special.

Lee. I cannot tell how to do it.

Jury. We ought not to be returned, having all agreed, and set our hands to the Verdict.

Rec. Your Verdict is nothing, you play upon the Court: I say you shall go together and bring in another verdict or you shall starve; and I will have you carted about the City, as in Edward 3rd's time.

Forem. We have given in our Verdict, and all agreed to it; and if we give in another, it will be a force upon us to save our lives.

Mayor. Take them up.

Offic. My Lord, they will not go up.

Obser. The Mayor spoke to the sheriff, and he came off his seat, and said,

Sheriff. Come gentlemen, you must go up; you see I am commanded to make you go.

Obser. Upon which the Jury went up; and several sworn to keep them without any accommodation, as aforesaid, till they brought in their Verdict.

Cry. O yes, Etc. The Court adjourns till tomorrow morning at 7 o'clock.

Obser. The prisoners were remanded to Newgate, where they remained till next morning, and then were brought unto the Court which, being sat, they proceeded as followeth.

Cry. O Yes, etc. Silence in the Court, upon pain of imprisonment.

Cler. Set William Penn and William Mead to the bar. Gentlemen of the Jury, answer to your names; Tho. Veer, Edw. Bushel, John Hammond, Henry Henley, Henry Mitchell, John Brightman, Charles Milson, Gregory Walklet, John Baily, William Leaver, James Damask, William Plumstead. Are you all agreed of your Verdict?—Jury. Yes.

Cler. Who shall speak for you?

Jury. Our Foreman.

Cler. Look upon the Prisoners. What say you? Is William Penn Guilty of the matter whereof he stands indicted, in manner and form etc. or Not Guilty?

Foreman. Here is our Verdict in writing and our hands subscribed.

Obser. The Clerk took the Paper, but was stopped by the Recorder from reading of it; and he commanded to ask for a Positive Verdict.

Foreman. That is our Verdict; we have subscribed to it.

Cler. How say you? is William Penn Guilty, etc. or Not Guilty?

Foreman. Not Guilty.

Cler. How say you? is William Mead Guilty, etc. or Not Guilty?

Foreman. Not Guilty.

Cler. Then hearken to your Verdict; you say that William Penn is Not Guilty in manner and form as he stands indicted; you say that William Mead is Not Guilty in manner and form as he stands indicted, and so you say all?

Jury. Yes, we do so.

Obser. The Bench being unsatisfied with the Verdict, commanded that every person should distinctly answer to their names, and give in their Verdict, which they unanimously did in saying, Not Guilty, to the great satisfaction of the assembly.

Rec. I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you; God keep my life out of your hands, but for this the Court fines you 40 marks a man; and imprisonment till paid. At which Penn stepped up towards the bench and said:

Penn. I demand my liberty, being freed by the Jury.

Mayor. No, you are in for your fines.

Penn. Fines for what?

Mayor. For contempt of the Court.

Penn. I ask, if it be according to the fundamental laws of England, that any Englishman should be fined or amerced, but by the judgment of his peers or jury; since it expressly contradicts the 14th and 29th chapters of the Great Charter of England, which say, 'No freeman ought to be amerced but by oath of good and lawful men of the vicinage.'

Rec. Take him away, take him away, take him out of the Court.

Penn. I can never urge the fundamental laws of England, but you cry, Take him away, take him away. But it is no wonder, since the Spanish Inquisition hath so great a place in the Recorder's heart. God Almighty, who is just will judge you all for these things.

Obser. They hauled the prisoners into the Bale-dock, and from thence sent them to Newgate, for non-payment of their fines; and so were their Jury. But the Jury were afterwards discharged upon an Habeas Corpus, returnable in the Common-Pleas, where their commitment was adjudged illegal.

TRIAL BY JUDGE AND JURY.

(Address of Judge Henry C. Caldwell, of the United States Circuit Court, before the recent meeting of the Missouri State Bar Association at St. Louis).

Mr. President and Gentlemen of the Bar Association:

There are some subjects which never grow old and never lose their interest. This is especially true of the vital institutions of the State. Unless they receive constant and unremitting attention they are in danger of impairment, and moreover will not receive such amendment or improvement as experience or altered conditions may dictate. Reduced to its last analysis, the intelligent and impartial administration of justice is all there is of a free government. It is the public justice that holds the community together. It is to the courts that all must look for the protection of their liberty, person, property and reputation.

The judicial department is not commonly regarded as the popular department of the government, but it is in fact the people's department—the department in the administration of which the people have a greater concern than in any other. It is the only department which comes home to them and deals with them in all the relations of life, from their birth to their death, and with their heirs and estates after their death; and it is the only department in the direct administration of which they have a constitutional right to participate. No apology, therefore, is offered for the subject of this paper, "Trial by Judge and Jury." While some aspects of the subject are trite, there are others of surpassing interest which are neither trite nor settled. By the term "trial by judge and jury" is implied a trial which takes place before a judge and jury—a trial in which the judge is commonly—though not in all cases—the exclusive judge of the law, and the jury the exclusive judge of the facts, and in some cases of the law also, and it comprehends besides the right of the citizen to have that kind of a trial.

It has been remarked that the judges—particularly the federal judges—who have recently addressed bar associations have very generally made the defense and commendation of judges their theme. There has been a conspicuous absence of any commendation of the jury. A paper on a somewhat different line will break the monotony if it has no other merit.

From an old law book on the British Constitution, printed more than two hundred years ago, this extract is made:

"By the laws of King *Ethelred*, it is apparent that *juries* were in use many years before the Conquest; and they are, as it were, *incorporated with our constitution, being the most valuable part of it*; for without them no man's life can be impeached, (unless by parliament) and no one's liberty or property ought to be taken from him."

The italics are in the book. In the judgment of Englishmen the right of trial by jury continues to this day to be the most valuable right secured to them by their constitution. All Englishmen acquainted with the history of their country know that it is not to the opinions of the judges, but to

the verdicts of the juries who courageously and firmly stood out against the judges, that they owe their most precious rights and liberties. The right of the people to assemble for lawful purposes and the right to address them when they were assembled, the right of free speech and the freedom of the press, and the right of petition for the redress of grievances were secured to the English people by English juries over the vehement protest of the judges.

Peremptory charges, browbeating, censures, fines and imprisonment were the weapons used by the judges to coerce juries to render verdicts conformable to their views; but happily for England, and for America too, the love of liberty, courage and endurance of English juries finally triumphed over despotic power and its servile judges.

In view of the actual experience of the English people with judges and juries, it is not surprising that her greatest statesmen and lawyers have expressed their preference for trial by jury in the strongest terms. Let the brief utterances of two or three of them be quoted. Lord Commissioner Maynard declared: "Trial by jury is the subject's birthright and inheritance as his lands are; and without which he is not sure to keep them or anything else. This way of trial is his fence and protection against all frauds and surprises and against all storms of power." And that great constitutional lawyer, Lord Camden said: "Trial by jury is indeed the foundation of our free Constitution; take that away and the whole fabric will soon moulder into dust." Lord Erskine took for his motto which he had inscribed on his family shield and crest, "*Trial by Jury*."

In an English law book printed a century and a half ago, the author declares:

"One of the most valuable branches of our laws is that which relates to juries, whose antiquity is beyond the reach of record or history; they have the same era with our Constitution, which cannot survive them; our liberty must expire with them, as the animal body with its most vital parts. Our ancestors were too prudent to trust such great concerns (liberty or property) in the hands of any officers appointed by the Crown, *or of any certain number of men during life*, lest they should be influenced or awed by great men, or corrupted by bribes, flattery, or love of power.

"The uncertainty of who shall be jurors on any inquisition or trial, and the little time they continue in that office, are strong barriers against corruption; but when we consider also the impartiality required and enforced in returning juries, and the properties which the law required in every jurymen when returned, we may almost doubt whether human wisdom is capable of providing a more perfect method of determining the truth of facts, consistent with the liberties of a free people, at least we may conclude that it has not hitherto done it."

A few of the cases in which the juries triumphed over the judges, and in which their verdicts have become foundation stones of the British Constitution, may be seen by reference to 22 American Law Review, 853, and in the dissenting opinion in *Hopkins vs. Oxley Slave Company*, 49 U. S. App., 709.

Passing from England to our own country, we find that the King's judges in the Colonies were as hostile to the rights and liberties of the people as

their brethren in England. But a part, and the best part, of the inheritance of the Colonies was the right of trial by jury, and fortunately Colonial juries were imbued with the love of liberty and splendid courage and independence that characterized English juries.

It is an interesting historical fact that despotic power and official oppression received its first check in the Colonies at the hands of a New York jury. The blow was a staggering one. It was the entering wedge to freedom which later was driven home. William Crosby was the Governor of New York in 1734. In the administration of his office he was unscrupulous, avaricious and arbitrary. The New York Weekly Journal, a paper established to defend the cause of liberty against arbitrary power, exposed his official corruption and oppression. For this its publisher, John Peter Zenger, "may his tribe increase," was thrown into prison and a criminal information filed against him by the Attorney General for libeling the Governor and other Colonial officers. History tells us the case excited intense interest, not in New York only, but in other Colonies, for it involved the vital issue of the liberty of speech and of the press, without which the people of the Colonies could not hope to be free. The case was brought on for trial before Chief Justice De Lancey whose first act was to disbar Zenger's counsel for questioning the validity of the judge's commission. Zenger's friends then sent to Philadelphia for Andrew Hamilton, one of the foremost lawyers of his time, who came on to New York to defend him. Zenger entered a plea of not guilty, admitted the publication of the alleged libel, and justified it by asserting its truth. A jury was impaneled to try the case. The Chief Justice refused to permit the defendant to prove the truth of the publication and charged the jury that it was libelous, and that it was their duty to return a verdict of guilty. The jury retired and soon returned with a verdict of "not guilty." The verdict electrified the country. Gouverneur Morris, one of the ablest and most sagacious statesmen of the revolutionary period, dated American liberty not from the Stamp Act of 1765, nor yet from the "Boston Tea Party," but from the verdict of the jury in Zenger's case. The rendition of this verdict constituted the immortalizing moment of those men's lives, and is the richest heritage of their descendants. If the names of those twelve patriots were at hand, they would appear here. Their names should go down in history with those of the foremost patriots of the Revolution.*

*Since this address was delivered its author, through the courtesy of Mr. Newman Erb, Esq., of New York City, has procured the names of the jurors. Mr. Erb's letter conveying the information is as follows:

New York, April 1, '99.

My Dear Judge:

I have found the information you desired and hasten to give it to you.

The pamphlet—bound, first edition—in which the record of the case first appeared is worth, I am informed, \$400, and later editions published in 1738 are very rare and almost equally expensive.

The book was found in the Astor Library, but is obtainable in several others.

This historic incident would not be complete without adding that the people bore Zenger's lawyer, Hamilton, out of the court room on their shoulders, and that the common council of New York gave him the freedom of the city in a gold box for his gratuitous services in "defense of the rights of mankind and the liberty of the press."

When the framers of the Declaration of Independence came to make a formal statement of the grievances of the Colonists against King George, one of the chief counts in the indictment was "for depriving them in many cases of the benefit of a trial by jury." While trial by jury was an undoubted heritage of the people of this country, they were unwilling that such a supreme and vital right should rest on the unwritten or common

The fly leaf is as follows:

The
Tryal
of
John Peter Zenger
of
New York Printer.

Who was lately Try'd and Acquitted for Printing and Publishing a Libel against the Government, with the Pleadings and Arguments on both sides.

It a quique evincere ut de Republoca meruit (Cicero).

The Third Edition.

London. Printed for Giadford behind the Chapter House St. Paul's Churchyard.

1738.

The opening page is as follows :

Supreme Court of Judicature.	
The Attorney General	} On information for a misdemeanor.
vs.	
John Peter Zenger	

On Tuesday, the 29th day of July, 1735, Chief Justice (Hon. James DeLancey, Esq.)

"Let the names of the Jurors be ranged in the order they were struck, agreeably to the Copy now in Court.

"Which was accordingly done. And the Jury whose names were as follows were called and sworn. Harmanus Rutgers, Stanley Holmes, Edward Man, John Bell, Samule Weaver, Andre Marschalk, Egbert von Barston, Thomas Hunt, Form, (Foreman) Benjamin Hildreth, Abraham Keteltas, John Goelet, Hercules Wendover."

I hasten to give you this from my residence this evening to save time, and hope it is all you want. If you wish further extracts made it will give me pleasure to attend to it. Your inquiry has called attention to a very interesting episode of early judicial history and I feel very much instructed thereby.

I am yours sincerely,

Hon. Henry C. Caldwell,
Little Rock, Ark.

NEWMAN ERB.

law. They were stern and inflexible in their demand that the right should be anchored in the Constitution in terms so explicit and peremptory as to make any evasion or denial of it impossible, except by overthrowing the Constitution itself.

BREWSTER ET AL. v. PEOPLE.

183 Ill. 143—55 N. E. Rep. 40.

Opinion filed December 18, 1899.

TRIAL—FALSE IMPRISONMENT—*Waiver of jury in trials for misdemeanors.*

1. Offense of false imprisonment is a misdemeanor. Since, under section 95 of the Criminal Code, the punishment for the offense of false imprisonment is a fine or imprisonment in the county jail, the offense is a misdemeanor.
2. Jury trial may be waived in case of misdemeanor punished by fine. Under the act of 1893, (Laws of 1893, p. 96,) providing for jury trial in cases where a judgment may be satisfied by imprisonment, it is competent for parties indicted for misdemeanor to make a written waiver of the right to trial by jury, where the judgment is the imposition of a fine alone, and imprisonment otherwise than in the penitentiary, in default of payment.
3. Waiver of jury trial in misdemeanor is not against the Constitution. When authorized by statute the right of trial by jury under an indictment for a misdemeanor may be waived by the accused without violating sections 5 and 9 of article 2 of the Constitution, providing that the right of trial by jury "as heretofore enjoyed" shall remain inviolate, and that the accused shall have the right to "a speedy public trial by an impartial jury."

Writ of error to the Criminal Court of Cook County; the Hon. Joseph E. Gary, Judge, presiding.

Charles L. Brewster and others being convicted of false imprisonment, bring error. Affirmed.

Plaintiffs in error were tried in the Criminal Court of Cook County at the July term, 1899, upon an indictment for false imprisonment, under section 95 of the Criminal Code. Each defendant pleaded not guilty, and executed in writing a formal waiver of jury trial. The court tried the issue, and found the defendants guilty. The judgment of the court was that each defendant should pay a fine of \$250 and costs, and that, in case of failure to pay the same, he should work out said fine and costs in the house of correction.

Plaintiffs in error moved for a new trial, which was over-

ruled, and exceptions were taken to the ruling of the court. They then moved in arrest of judgment which motion was also overruled, and exceptions were also taken to such ruling of the court.

This writ of error is sued out for the purpose of reviewing the judgment so entered against the plaintiffs in error.

Jesse E. Roberts (*Roscoe L. Roberts* and *Thomas H. Owens* of counsel), for the plaintiffs in error.

Edward C. Akin, Attorney General (*Charles S. Deneen*, States Attorney, and *Albert C. Barnes*, Assistant States Attorney of counsel), for the People.

MR. JUSTICE MAGRUDER delivered the opinion of the court.

Section 95 of the Criminal Code, under which the plaintiffs in error have been indicted for false imprisonment, is as follows: "False imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. Any person convicted of false imprisonment shall be fined in any sum not exceeding \$500.00, or imprisoned not exceeding one year in the county jail." (1 Starr & C. Ann. St., 2d Ed., p. 1278.) By section 5 of division 2 of the Criminal Code, a felony is defined to be "an offense punishable with death or by imprisonment in the penitentiary." By section 6 of division 2 of the Criminal Code, it is provided that, "every other offense is a misdemeanor." (1 Starr & C. Ann. St., 2d Ed., p. 1356.) As, therefore, the punishment for the offense of false imprisonment is a fine not exceeding \$500, or imprisonment not exceeding one year in the county jail, the offense charged against the plaintiffs in error is a misdemeanor.

When the issue was joined by the pleading of not guilty, each of the plaintiffs in error signed a written waiver, by the terms of which he waived jury trial, and submitted the cause to the court for hearing. The record recites, that the court fully advised the plaintiffs in error of their right to a trial by jury, but that they adhered to their proposition to waive said right; and that, thereupon, by agreement of the State's Attorney and the plaintiffs in error and their counsel, the cause was submitted to the court for trial, and the intervention of a jury was waived.

The only question presented for our consideration is, whether, in this State, the accused may waive the right to a trial by jury

upon an indictment for a misdemeanor, where the judgment is the imposition of a fine alone, and imprisonment on failure to pay the same.

In *Harris v. People*, 128 Ill. 585, 21 N. E. 563, it was held that, in a prosecution for a felony, when the plea of not guilty is entered, the right to a jury trial cannot be waived by the accused, so as to confer upon the court jurisdiction to try, convict, and sentence the defendant without the intervention of a jury. In that case, however, the prohibition against the right to waive a jury trial was applied only to indictments for felony, and not to cases where the offense is a mere misdemeanor. So again in *Morgan v. People*, 136 Ill. 161, 26 N. E. 651, the case of *Harris v. People*, *supra*, was referred to with approval, and we there said: "The record affirmatively shows, as we think, that plaintiff in error was tried for and convicted of a felony, upon his plea of not guilty, by the judge sitting as a jury. Consent of the defendant in an indictment for a felony cannot confer jurisdiction upon the judge, or dispense with a finding of the fact of guilt by a jury." In several cases in this State, the right of the accused to waive a jury in trials for misdemeanors has been recognized as a proper practice. In *Zarresseller v. People*, 17 Ill. 101, which was an indictment for a misdemeanor, we said: "The issue was tried by the court, by agreement of the parties in open court, and this is also assigned for error. We do not doubt the right of the defendant, in cases of misdemeanor, to waive a jury and put himself upon the court for trial. He may waive his right in this respect, and, having done so, cannot assign for error that the court tried the issue: *People v. Scates*, 3 Scam. 351." Again, in *Darst v. People*, 51 Ill. 286, which was an indictment for a misdemeanor, tried before the court without a jury we said: "It is urged that a jury could not be waived, but we know no reason why it may not be in trials for misdemeanors." The two cases above referred to arise under the Constitution of 1848, and before the present Constitution of 1870 was adopted.

It is contended, however, by counsel for plaintiffs in error, that a jury can no more be waived in a trial upon an indictment for a misdemeanor than in a trial upon an indictment for a felony. This contention is based mainly upon sections 5 and 9 of article 2 of the Constitution of 1870. Section 5 of article

2 is as follows: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law." Section 9 of article 2 is as follows: "In all criminal prosecutions the accused shall have the right * * * to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Section 8 of article 2 of the Constitution provides that "no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary," etc. Section 8, by the use of the words, "in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary," evidently refers to misdemeanors, and its plain meaning, is that a person may be held to answer for a misdemeanor without indictment by a grand jury. The Constitution thus clearly draws a distinction between felonies and misdemeanors, so far as indictments by grand juries are concerned. A similar provision in the Constitution of New York was there held to indicate, that all other cases than those in which the accused persons were charged with capital, or other infamous crimes should be left to the regulation of the Legislature. (*People v. Fisher*, 20 Barb. 656.)

The language of section 5 of article 2 of the Constitution, to wit, "The right of trial by jury, as heretofore enjoyed, shall remain inviolate," has been before this court for construction in a number of cases. Those words have been construed as preserving the right of trial by jury, as it was understood to exist at the time of the adoption of the Constitution. (*Ross v. Irving*, 14 Ill. 171; *Insurance Co. v. Scammon*, 123 Ill. 601, 14 N. E. 666.) If the guaranty of section 5 is simply the guaranty of a right of trial by jury, as it was enjoyed at the time of the adoption of the Constitution of 1870, then such right includes and involves the right of the accused to waive a jury in case of a trial for misdemeanor, because the cases of *Zarresseller v. People*, *supra*, and *Darst v. People*, *supra*, show, that the right of trial by jury was understood to involve the right of such waiver, when the Constitution of 1870 was adopted.

In the later case of *George v. People*, 167 Ill. 447, 47 N. E. 741, it was held that the word "heretofore," as used in the Con-

stitution, relates to the past, and that, in order to determine the true meaning of the words, "right of trial by jury as heretofore enjoyed," it was necessary to go back to the common law of England; and it was there said, that the construction of these words, as referring to the system of trial by jury as it existed by statute at the time the Constitution was adopted, would lead to many embarrassing results. It was, however, said in the *George Case*, that, by a reference to the common law of England, it would be found that the requirement, that a jury of 12 men must be impaneled, and that any less number would not be a common-law jury, applied to trials where the accused persons were charged with felonies. The language of the case of *George v. People*, *supra*, upon this subject, is as follows: "It is necessary to go back to the common law of England. When this is done, it will be found that the right of trial by jury constitutes certain specified things, which cannot be dispensed with or disregarded on the trial of a person charged with a felony." The *George Case* thus recognizes the soundness of the rulings in the *Harris Case* and in the *Morgan Case*, that a trial by jury cannot be waived, where the trial is upon a charge of felony.

"No jury trial in criminal cases was ever known to the common law but such as followed upon indictment in a common-law court, after the accused was in custody, had been arraigned, and had pleaded guilty, to the indictment." (*People v. Fisher*, 20 Barb. 656; *People v. Justices*, 74 N. Y. 406; *State v. Conlin*, 27 Vt. 319.) As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common-law court, and as our constitution refers to the right of trial by jury as it was understood at common law, then the prohibition against the right to waive a trial by jury cannot apply to misdemeanors, because the Constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment.

It is to be observed, also, that section 5 of article 2 of the Constitution does not say, that "trial by jury as heretofore enjoyed shall remain inviolate," but that "the right of trial by jury as heretofore enjoyed shall remain inviolate." So, also, section 9 does not say that "in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury," but that "in all criminal prosecutions the accused shall have the

right to a speedy public trial by an impartial jury," etc. Where a Constitution thus provides, that the right of trial, and not the trial itself, shall be preserved, the right may be relinquished or waived. In *Bank of Columbia v. Okely*, 17 U. S. 236, 4 L. Ed. 559, the Supreme Court of the United States said: "Had the terms been that 'the trial by jury shall be preserved,' it might have been contended that they were imperative, and could not be dispensed with. But the words are that 'the right of trial by jury shall be preserved,' which places it on the footing of a *lex pro se introducto*, and the benefit of it may therefore be relinquished." (*In re Staff*, 63 Wis. 285, 23 N. W. 587; *State v. Kaufman*, 51 Iowa, 578, 2 N. W. 275; *State v. Worden*, 46 Conn. 349; *State v. White*, 33 La. Ann. 1218; *Edwards v. State*, 45 N. J. Law, 419.)

What has already been said, however, is subject to the qualification that there is some statute or law which provides for and permits the waiver of a trial by jury. Where a tribunal for the trial of criminal prosecutions is provided for, and a jury is made an essential part of it, such tribunal cannot be changed by permitting the accused to consent to the elimination of the jury therefrom. In such cases the accused would, by waiver of a jury trial, and consent to a trial before the judge alone, confer jurisdiction upon a tribunal, which had no such jurisdiction under the law. It is a well-settled doctrine, that jurisdiction of the subject-matter cannot be conferred by consent. Jurisdiction of the subject-matter must always be derived from the law, and not from the consent of the parties. Hence, where an act of the legislature provides that, in a prosecution for a misdemeanor, the accused party, if he elects to do so, may be tried by the court, instead of by a jury, such act will be held to be valid under the provisions of the Constitution above quoted; such waiver being required to be made in writing, and the party being advised of his right to a jury trial, if he chooses to insist upon it. Where the waiver of a right to a jury trial has been authorized by statute, the courts have upheld the constitutionality of such statutes, and have enforced them in many cases. (*Edwards v. State*, 45 N. J. Law, 419; *Connelly v. State*, 60 Ala. 89; *State v. Worden*, 46 Conn. 349; *In re Staff*, 63 Wis. 285,* 23 N. W. 587; *Dillingham v. State*, 5 Ohio St. 280;

*183 Ill. erroneously gives this citation as: 63 Wis. 635.—J. F. G.

State v. Moody, 24 Mo. 560; *Murphy v. State*, 97 Ind. 579; *State v. Ill.*, 74 Iowa, 441, 38 N. W. 143; *State v. Robinson*, 43 La. Ann. 383, 8 South. 937; *Ward v. People*, 30 Mich. 116; *League v. State*, 36 Md. 257.)

In *Harris v. People*, *supra*, it was clearly laid down, that, while a party might not have the right to waive a trial by jury, where no statute authorizes it, yet that he could so waive trial by jury where the law permitted it. This is true, at any rate, so far as misdemeanors are concerned. Many cases, which have denied to the accused the right to waive a trial by jury, have so decided, because no statute conferred the right of waiver, but have plainly intimated that it might be conferred by statute. *Wilson v. State*, 16 Ark. 601 (*State v. Maine*, 27 Conn. 281;* *Harris v. People*, 128 Ill. 585, 21 N. E. 563; *State v. Carman*, 63 Iowa, 130, 18 N. W. 691; *State v. Mansfield*, 41 Mo. 471; Opinion of Justices, 41 N. H. 551; *People v. Smith*, 9 Mich. 193; *State v. Conlin*, 27 Vt. 319).

In this state an act of the legislature was passed on June 17, 1893, which provides "that no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi criminal, or *qui tam* action, except upon conviction by jury: *Provided*, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing: *And, provided further*, that this provision shall not be construed to apply to fines inflicted for contempt of court: *And, provided further*, that when such waiver of jury is made, imprisonment may follow the judgment of the court without conviction by a jury." (Sess. Laws Ill. of 1893, p. 96.)

The act of 1893 above quoted provides for the waiver of a jury trial in cases where a fine is imposed, and also provides that imprisonment may follow where the fine so imposed is not paid. It, therefore, authorizes the waiver of a trial by jury in prosecutions for misdemeanors. The act only applies where a fine is imposed, or a money judgment is rendered. It has no application to criminal prosecutions for felonies.

In the case at bar, a written waiver was filed in strict ac-

*183 Ill. gives this citation as:—27 Conn. 28, while 55 N. E. Rep. gives it as:—27 Conn. 681. There are two cases by that name in the 27th Conn. One at page 281 and the other at 641. The former is in point, while the latter is not; so we correct the citation and make it as above.—J. F. G.

cordance with the act of 1893. The Criminal Court of Cook County exercised the power to try the defendants without a jury because of the waiver allowed by the statute, and not because of the consent of the accused in the absence of statutory warrant. The present case, therefore, is brought directly within the reasoning of those cases, where the right of waiver is sustained when the waiver is authorized by statute.

We are inclined to hold to the doctrine announced in the following words: "It is generally conceded that in civil actions and proceedings, and in the absence of constitutional or statutory inhibition, the right of a party to have the issues of fact in a cause determined by a jury is a privilege of such a nature that he may waive it if he so chooses. Although there is some question as to the power to waive the right in criminal proceedings, the modern tendency is to apply the same rules as those governing proceedings civil in their nature, where the offense charged is a misdemeanor. * * * In the trial of capital felonies, however, the felonies of the higher grades, the same doctrine does not apply, and in such cases, especially where the punishment, on conviction, is death, or imprisonment for life or for a long term of years, the right to a trial by jury, which is guaranteed by constitutional provision or otherwise, cannot, as a rule, be waived." (12 Enc. Pl. & Prac. p. 255.)

The text-books affirmed the doctrine, that, while the court cannot, in such cases, proceed without jurisdiction, and consent without a statute cannot give jurisdiction, yet that, in cases of misdemeanor, at any rate, defendants can waive a trial by jury when such waiver is permitted by the terms of the statute. (1 Bish. on New Cr. Proc. § 893; Wharton, on Cr. Pl. and Pr. § 733; Cooley, Const. Lim., 6th Ed., pp. 390, 391.)

Counsel for plaintiffs in error make no complaint of the action of the trial court, except that the trial was had before the court without a jury, in pursuance of the written waivers filed in the cause, as above stated. We are of the opinion that the trial court committed no error in this regard.

Accordingly, the judgment of the Criminal Court of Cook County is affirmed. Judgment affirmed.

DURDEN v. PEOPLE.

192 Ill. 493—55 L. R. A. 240—61 N. E. Rep. 317.

Opinion filed October 24, 1901.

TRIAL—The same judge must preside throughout the entire trial.

1. One judge cannot delegate judicial authority to another. The fact that circuit judges may hold court for each other and perform each other's duties does not authorize one judge to allow another to finish the performance of a duty already entered upon by the former, where such duty involves the exercise of judicial deliberation upon facts known to the former and not to the latter.
2. A prisoner on trial for his life is entitled to the judgment of the judge who has heard the evidence and concluded the trial, and it is reversible error for the judge who has heard the evidence and part of the argument to leave the bench and permit another judge of the same circuit who has not heard the evidence to hear the remaining arguments, giving the instructions and receive the verdict.

Writ of error to the Circuit Court of Pulaski County; Hon. A. K. Vickers, Judge, presiding. Judgment reversed.

STATEMENT OF CASE.

This is an indictment, returned at the October term, A. D. 1900, of the Circuit Court of Pulaski County by a grand jury, chosen, selected and sworn in and for that county, against the plaintiff in error, George Durden, for the murder of one Marshall Hileman on the 26th day of June, A. D. 1900. The case was tried at the January term, 1901, of said court. The jury returned a verdict finding plaintiff in error guilty as charged in the indictment, and fixing his punishment at death. Motions for new trial and in arrest of judgment were overruled, and on February 25, 1901, the court entered judgment upon the verdict of the jury, and passed sentence upon plaintiff in error pursuant to said verdict, and entered an order that he be executed on Friday, the 12th day of April, A. D. 1901. This court, at its April term, 1901, ordered that a writ of error be issued, and that the same be made a *supersedeas*.

H. A. Mason, L. G. Carter, and H. G. Carter, for plaintiff in error.

H. J. Hamlin, Attorney General, and George E. Martin, State's Attorney (B. D. Monroe, of counsel), for the People.

MR. JUSTICE MAGRUDER delivered the opinion of the court. Many errors are assigned upon this record, but we deem it necessary to consider only one.

The trial of the case commenced on January 21, 1901, before the Hon. Joseph P. Robarts, one of the judges of the First judicial Circuit of the State of Illinois, who heard all the evidence in the case, and the opening argument for the prosecution, and a portion of the arguments of counsel for plaintiff in error, and presided at the trial and conducted the same up to and until the close of the 30th day of January, 1901. On the 30th day of January, 1901, the Hon. Joseph P. Robarts vacated the bench as presiding judge, and left the county of Pulaski; and thereafter took no part in the trial of the cause, nor in any of the other proceedings therein, until the hearing of the motion for a new trial on February 25, 1901, which he overruled. This vacation of the bench was without the knowledge or consent of the plaintiff in error or his counsel, or either of them.

On January 31, 1901, the Hon. A. K. Vickers, another one of the judges of the First Judicial Circuit of the State, took the place of the Hon. Joseph P. Robarts on the bench, and thereafter acted as the presiding judge in the case against the protest of the plaintiff in error. Hon. A. K. Vickers thereafter heard the closing argument of one of the counsel for plaintiff in error, and the closing argument of the prosecution, and gave all the instructions to the jury which were given, and refused certain instructions offered by the plaintiff in error. He also received the verdict of the jury, and adjourned court until February 4, 1901.

There are two bills of exceptions in the cause, one signed by the Hon. Joseph P. Robarts, showing the proceedings taken before him, including the evidence and the overruling of the motions for new trial and in arrest of judgment. Another bill of exceptions is signed by the Hon. A. K. Vickers, showing the proceedings taken before him, including the instructions given to the jury and the instructions refused, and also the return of the verdict by the jury.

The bill of exceptions signed by the Hon. A. K. Vickers shows, among other things, the following proceedings, to wit: "Be it remembered that, during the progress of this trial and on the 31st day of January, A. D. 1901, the Hon. A. K. Vickers, judge,

takes the place of the Hon. Joseph P. Robarts on the bench, said exchange of judges occurring during the closing argument on behalf of the defendant, and said Hon. A. K. Vickers, judge, so presiding, made the following rulings, during the progress of said trial; that is to say: * * * Now, on this day, 31st day of January, A. D. 1901, being the tenth day since the commencement of the trial of this case, comes the defendant and objects to the action of the Hon. Joseph P. Robarts this day, without the consent of this defendant or any notice to him, vacating the bench at this stage of the proceedings and placing thereon another judge to preside in his place; and he also objects to the court reporter absenting himself with his notes of the evidence in this case without the knowledge or consent of this defendant; and exception is hereby taken by George Durden, defendant in this case."

The bill of exceptions shows the order of court overruling defendant's objections, as above made, and exceptions thereto. It then recites that the trial proceeded before the Hon. A. K. Vickers, judge, and the argument was concluded. It further recites as follows: "And thereupon the court gave and read to the jury for and on behalf of the people, plaintiff, the following instructions over the objections of the defendant, to wit." Then follow 20 instructions given to the jury by the Hon. A. K. Vickers for and on behalf of the people, each of which is marked "Given." Exceptions were taken by the defendant to the giving of each of said last-named instructions. The bill of exceptions then proceeds to recite as follows: "And thereupon the court for and on behalf of the defendant read to the jury the instructions following, which said instructions had before that time been passed upon, approved, and marked 'Given' by the Hon. Joseph P. Robarts while presiding upon the trial of said cause, and before the said Hon. A. K. Vickers came to preside upon said trial." Then follow instructions numbered from 1 to 18, inclusive, given and read to the jury for and on behalf of the plaintiff in error.

The bill of exceptions then recites that plaintiff in error, by his counsel, then and there asked the court to also give and read to the jury instructions numbered 19 and 20, for and on behalf of the plaintiff in error, but that the court refused to give and read the said instructions to the jury, to which refusal plaintiff

in error, by his counsel, then and there excepted. The court then gave to the jury instructions in regard to the form of their verdict.

The bill of exceptions, signed by Judge Vickers, closes as follows: "And upon the return by said jury of said verdict, the defendant then and there by his counsel excepted to said verdict, and moved the court to set aside said verdict and grant the defendant a new trial in said cause, whereupon the said presiding judge, A. K. Vickers, stated that Hon. Joseph P. Robarts, one of the judges who had presided at this trial, would consider the motion for a new trial on Monday, February 4, A. D. 1901, whereupon the said Circuit Court was adjourned to the fourth day of February, A. D. 1901."

The foregoing proceedings, consisting of the vacation of the bench by Judge Robarts, and the conduct of the trial thereafter by Judge Vickers, are assigned as error by the plaintiff in error.

Several significant facts are involved in this assignment of error. Before the trial of the case was concluded, and before the argument in favor of the prisoner was finished, the judge who had presided at the trial up to that time left the bench, and another judge who, so far as this record shows, knew nothing about the proceedings which had taken place up to that time, took his place upon the bench, and presided during the rest of the trial, and gave the instructions to the jury, and received the verdict.

It appears from the bill of exceptions, that the instructions, which were given for the defendant, had been passed upon and marked "Given" by Judge Robarts before he left the bench. They were read to the jury by Judge Vickers. Judge Vickers, however, gave and read to the jury all the instructions which were given for the State, and himself passed upon the same, and approved of the same, and marked the same "Given." We regard this assignment of error as being well taken. It requires a reversal of the cause, and therefore we pass no opinion upon the facts.

It is well settled that "the argument of a cause is as much a part of the trial as the hearing of evidence." (*Meredeth v. People*, 84 Ill. 479; *Thompson v. People*, 144 Ill. 378, 32 N. E. 968; *State v. Carnagy*, 106 Iowa, 487, 76 N. W. 805; *Ellerbe v. State*, 75 Miss. 527, 22 South. 950; *State v. Beuerman*, 59 Kan. 591, 53

Pac. 874). It is also a general rule, established by the weight of authority, that, in prosecutions for felonies, the continual presence of the judge during the entire course of the trial is essential; and it is expressly held in many decisions that, in the trial of capital cases, the judge should not retire from the bench, even for a brief absence, without ordering a suspension of business until his return. (21 *Enc. Pl. & Prac.* pp. 978, 979) and cases referred to in notes.

It is claimed here, however, on the part of the State, that, during the trial of this case, the bench was at no time vacant, because, as soon as one circuit judge left the bench, another circuit judge, having equal power and belonging to the same circuit, took his place. The court, it is said, was the same during the whole of the trial, although two different persons presided during the trial at different times. In justification of the proceeding here under consideration section 62 of chapter 37 of our statutes, entitled "Courts," is referred to. That section provides that "judges of the several Circuit Courts of this State may interchange with each other and * * * may hold court or any branch of the court for each other, and perform each other's duties, where they find it necessary or convenient." (1 *Starr & C. Ann. St.* 2d Ed. p. 1160.) The vacation and substitution, which took place in this case, find no justification in the section thus referred to.

A prisoner on trial for his life is entitled to the judgment of the judge, who has heard the evidence in the case, and conducted the trial thereof. The instructions given by a judge must be based upon the facts, and necessarily involve an application of the law to the particular facts of the case. Here, the instructions given for the State were given by a judge who heard none of the evidence. Two instructions asked by the defendant were refused by a judge who heard none of the evidence. It is true, that the absence of one judge from the bench before the close of the trial was followed by the presence of another judge of equal power and jurisdiction. It is also true, that circuit judges may hold court for each other and perform each other's duties where they find it necessary or convenient. But this does not involve the right or power of one judge to finish for another the performance of a duty already entered upon by the latter, when that duty involves the exercise of judgment and the application

of legal knowledge and judicial deliberation to facts known to the latter and not known to the former.

It is a well-settled principle of law that a judge cannot delegate his judicial authority to another. (*Ellerbe v. State, supra.*) In *Davis v. Wilson*, 65 Ill. 525, we said: "Judicial functions cannot be delegated to or exercised by an agent or deputy." Where a cause has been submitted to a judge upon the law and facts, as argued by counsel, for his consideration and determination, he cannot delegate to another judge the consideration and determination of that case, even though the latter possesses the same or equal judicial power. In the case at bar, the instructions, given for the plaintiff in error, were passed upon and approved by Judge Robarts before he left the bench and marked "Given" by him. The reading of these instructions to the jury was delegated by him to another judge, who had not heard the evidence, nor even all of the arguments made in the case. The task of passing upon the instructions offered in behalf of the State was not only abandoned by Judge Robarts, but was delegated by him to Judge Vickers, who had not heard the evidence to which the instructions in question were to be applied.

It appears in this case that, during the closing argument of the State's Attorney to the jury and while Judge Vickers was upon the bench, a dispute arose between counsel as to the testimony of one of the witnesses, and the judge on the bench replied that he could not say what the evidence was. To this the plaintiff in error excepted. This shows the danger of allowing a judge to preside during the closing argument of a cause when he has no knowledge of what the testimony in the case was.

In none of the authorities to which we have been referred are the facts precisely similar to the facts in this case.

In *Meredeth v. People*, 84 Ill. 479, which was an indictment for murder, the judge of the Circuit Court was absent from the court room during the trial of the cause by consent of counsel for the defense, and was engaged elsewhere in the performance of other official duties, and, during his absence, his place upon the bench was occupied successively by two members of the bar; and it was there held to be error for the judge before whom a case was on trial, to leave the court room while the cause was being argued before the jury, and that the judge should not, even by consent of the parties, be elsewhere em-

ployed. In the *Meredeth Case* we said (page 482): "The absence of the judge from the court room, engaged in other judicial labors, for a part of two days, in a trial of this magnitude, cannot be justified on any principle or for any cause. It is not allowable in a trial involving only mere property interests, much less in a case where the life of a human being depends upon the the issue." In *Thompson v. People*, 144 Ill. 378, (32 N. E. 968), we said (page 381): "On the trial of a criminal case before a jury the defendant has a right to be heard before the jury in person or by counsel as he may elect, and the people have a right to be heard through the State's Attorney or such other person as may be selected for that purpose. This is a right guarantied by law. Indeed, the argument before the jury is a part of the trial of a cause, as well as the introduction of evidence to prove the innocence or guilt of a defendant or any other fact at issue on the trial. If the presiding judge may leave the court room and engage in other business during the argument before the jury, he may upon the same ground leave while the evidence is being introduced during the progress of the trial at any other stage of the proceeding. Under our system of practice in the Circuit Court, during the progress of any judicial proceeding, the law requires a presiding judge to sit during each and every stage of such proceeding. * * * No part of the closing argument for the State was heard, and, although several objections were made to different portions of the argument, they were not, on account of the absence of the judge from the court room, passed upon or decided. Under the law the defendant, who was on trial for a serious crime, one which deprived him of his liberty, had the right to the presence of the presiding judge during the argument of the case before the jury, and the absence of the judge was, in our opinion, an error of sufficient magnitude to reverse the judgment." In our view, it makes no difference that another Circuit Judge of equal power and jurisdiction was presiding in place of the absent judge, if he had no such knowledge of the testimony, already given upon the witness stand, and of the proceedings, already taken in the cause, as to be able to direct and control the arguments of counsel when they pass beyond proper limits, and to determine whether or not the instructions to be given to the jury are based upon the evidence already heard in the presence of the jury.

In *Hall v. Hamilton*, 74 Ill. 437, we said (page 440): "One judge may settle a portion of the pleadings, or decide motions in a case, and another judge may settle other portions of the pleadings and decide other motions, and another judge may try the case, or all may be done by one judge, so the record shows what was done by each judge in the case." The statement here made, that "another judge may try the case," is inconsistent with the contention that two judges may try the case. (See, also, *Courson v. Browning*, 78 Ill. 208.)

Certain cases are referred to by counsel for the people, which are alleged to hold views inconsistent with those thus far expressed; but, when they are carefully examined, such inconsistency will be found not to exist. In *Chicago, Pekin & S. W. R. R. Co. v. Town of Marseilles*, 107 Ill. 313, it appeared that the trial was conducted before one judge, and no motion for a new trial was made when the verdict was rendered, but, during the trial term, the unsuccessful party entered a motion for a new trial before a judge other than the one who presided at the trial of the cause, and it was held that the latter judge had rightful authority to deny the motion, and that it was not error to do so. In the *Marseilles Case*, however, while it appeared that one judge presided at the trial and another passed on the motion for a new trial, it did not appear that two judges presided on the trial itself, and that the evidence and a part of the arguments were heard by one judge, and the rest of the arguments were listened to by another judge, and that the instructions were prepared by two different judges and read to the jury by a judge who never heard the evidence in the cause. In *People v. McConnell*, 155 Ill. 192, 40 N. E. 608, the question was as to the power of one judge to decide a motion for a new trial, where the judge, who tried the cause, had died after verdict, and pending a motion for new trial. That is an entirely different question from the one here involved.

Counsel for the State refer to a statement in Bishop on New Criminal Procedure (Vol. 1, § 314, par. 7), where it is said: "The court and judge are distinguishable, so that one judge may try a prisoner and another sentence him; and this principle applies to various like questions of judicial changes and substitutes." The statement of the text writer is based upon two cases, to wit, *Pegallow v. State*, 20 Wis. 61, and *Charles v. State*,

4 Porter 107. In *Pegallow v. State*, *supra*, the circuit judge, before whom the plaintiff in error was tried and convicted, had gone out of office, and had been succeeded by another judge, who pronounced judgment upon the verdict; and the question arising upon the record was whether the circuit judge had power to pass sentence upon a prisoner convicted before his predecessor in office; and it was there held that he had such power; but, there, the plaintiff in error was convicted of murder in the first degree, and the statute fixed the penalty for the crime, so that nothing was left to the discretion of the court. In *Pegallow's Case* it is said: "Where a discretion was given, there might be some reason for saying that the judge who pronounced the sentence should be acquainted with the circumstances of the case, as disclosed at the trial, in order to award the proper degree of punishment. But no such reason can apply here." In the case at bar, the judge, who succeeded the trial judge, exercised a discretion and judgment as to the instructions to be given, and hence, under the doctrine of the *Pegallow Case*, it was necessary for him to "be acquainted with the circumstances of the case as disclosed at the trial."

In *Charles v. State*, *supra*, where a verdict of guilty was rendered in a criminal case, and the court adjourned without giving judgment thereon, it was held that a different judge, presiding at a different term, had power to render the judgment which the first court should have given. But, there, it appeared that, before the next term of the court, the judge, who presided on the trial of the indictment, had died. In the case at bar, there was no death, nor sickness, which justified the judge, who conducted the trial, in vacating the bench. It does not appear for what reason he abandoned the trial of the cause and turned it over to another judge. But, even if he went into another county in order to attend to other business upon his circuit, as is alleged by the attorney general, there was no official business, which more properly demanded his attention than the trial in hand, which involved the life of a human being.

The case of *Watkins v. Paine*, 57 Ga. 50, has no application here, because that was a case where a motion for a new trial was made before the successor of the judge who had heard the case, and the court held that such successor might legally pass upon the motion.

In *Bullock v. Neal*, 42 Ark. 279, the judge at a trial became sick, and unable to preside, after the evidence was all in and the instructions had been given to the jury, and it was there held that the trial should proceed under a special judge before the same jury, and without rehearing the testimony. (See, also, 17 *Am. & Eng. Enc. of Law* (2d Ed.) p. 721.) That case, however, differs from the case at bar, because there the instructions had been given to the jury by the trial judge before the special judge took his seat on the bench, while, here, most of the instructions were passed upon, and all were given, by the substituted judge.

The course of decision in the State of New York is in favor of the position that a judge, who has not heard the evidence in the case, is not qualified to take part in the proceedings of the court. In *Shaw v. People*, 3 Hun, 279, it appeared that, under the law, the court was composed of a justice of the Supreme Court, who presided, and of the county judge and two justices of the peace; that several days were devoted to the taking of evidence, when an adjournment over Sunday was had, and, during the adjournment, one of the justices absented himself and continued absent during the whole of Monday; and, on Tuesday morning, without having heard the evidence given on Monday, and without having read it, and without the evidence being again given, resumed his seat upon the bench and took part in the deliberations of the court during the rest of the trial; and it was there held that he was not qualified to take part in the proceedings of the court. In *Shaw v. People*, *supra*, it was said, in reference to the justice thus absenting himself: "His vote and voice upon any question arising upon the trial after his return may have produced a different result from what they would, had he remained during the whole trial, heard the whole evidence, and given his reflective judgment to it, preparatory to voting and speaking in the deliberations which ensued after his return to the bench which he had, as to the parts of the trial which took place on Monday, vacated and abandoned. It is not for us to speculate, in a case where the life of a prisoner is involved, as to the extent of the influence of the vote and voice of one who has not heard the whole evidence. The prisoner is entitled to the full benefit of the understanding and judgment of those who take part in the judicial deliberations which affect

his life. He is entitled to all the forms of law, to all the provisions of the constitution by which his rights are secured. Where life is involved, the law humanely provides that the prisoner stands upon all his rights, and does not and cannot waive them. * * * It may be said to be erroneous for a member of the court to take part in the deliberation, consultation, and rulings, when he has not heard the whole evidence given upon the trial. * * * It certainly is against public policy to allow a party to be deprived of his life by a tribunal, of which it can be said, that a portion thereof has not heard the whole evidence and proceedings which result in the sentence of death."

So, in the case at bar, this plaintiff in error was entitled to the full benefit of the understanding and judgment of the judge who heard the evidence and conducted the trial up to the time of the making of the closing arguments. Here, the trial was conducted by two judges, one succeeding the other, and here, also, as was the case in *Shaw v. People*, *supra*, it is against public policy to allow this plaintiff in error to be deprived of his life by a tribunal of which one of the sitting judges did not hear the whole evidence and the proceedings resulting in the sentence of death against him. The decision in *Shaw v. People*, *supra*, as rendered by the Supreme Court of New York, was affirmed by the court of appeals of the State of New York in *People v. Shaw*, 63 N. Y. 39, where it is said: "After the trial had progressed several days, Justice Steere absented himself from the court for an entire day, during which the trial proceeded and evidence was taken. * * * He did return, and took part in the subsequent proceedings. This the general term decided, for the very cogent reasons, and upon the authorities * * * stated by Judge Hardin, was error."

In *Blend v. People*, 41 N. Y. 604, where it appeared that the trial proceeded before a legal tribunal consisting of the county judge and two associate justices, and one of the justices abandoned the bench during the trial and another justice took his place, it was said: "This is not the case where a member of the court leaves the bench for a few moments, intending to return, and does return, but a total abandonment of the trial, in consequence of which one-third of the court is changed; and it is not for us to speculate in regard to the probable injury which might result from the substitution of Davidson; it is sufficient

that the prisoner had a right to insist that his trial should proceed before the same court before which it was commenced. It is insisted by the counsel for the defendants in error, that no possible injury could result to the prisoner in consequence of such change. We have no means of determining that question, as we are unable to ascertain from the facts before us, what influence Elwood (who abandoned the trial) might have exercised during the trial or in determining the punishment to be inflicted upon the prisoner."

In the case at bar, we think that the plaintiff in error had a right to insist that his trial should proceed before the same judge before whom it was commenced. It is not sufficient that the court or the tribunal was the same by the substitution of another judge of equal power. Section 51 of the practice act provides that "the court, in charging the jury, shall only instruct as to the law of the case." (3 *Starr & C. Ann. St.* (2d Ed.) p. 3045.) And section 52 of the same act provides as follows: "Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing." (Id. p. 3047.) Section 53 provides as follows: "And when instructions are asked which the judge cannot give, he shall, on the margin thereof, write the word 'Refused;' and such as he approves he shall write, on the margin thereof the word 'Given;' and he shall in no case, after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing. Exceptions to the giving or refusing any instructions may be entered at any time before the entry of final judgment in the case." (Id. p. 3048.) It will be noticed that in sections 52 and 53 the word "judge" is used in place of the word "court," which appears in section 51. It is the particular person presiding as judge, and not the court as a tribunal, who, under section 53, is required to mark the word "Given" upon instructions which he approves and the word "Refused" upon instructions which he refuses. The words "the judge," as used in section 53, refer to the presiding judge, or the judge who has heard the evidence and has conducted the trial. A single judge is there referred to, and there is no reference to more than one judge. The language of section 53 excludes the idea that more than one judge can participate in passing upon the instructions to be given to the jury, or that any other judge

can pass upon such instructions than the one who has heard the evidence and conducted the trial.

It is impossible for us to say that no injury resulted to this plaintiff in error from the substitution, in the manner heretofore indicated, of one judge for another during the trial of the cause. This was done over the objection and against the protest of the counsel of plaintiff in error, made in the presence of the jury. It cannot be known what impression this change may have made upon the minds of the jury to the prejudice of the plaintiff in error. In *Smith v. Sherwood*, 95 Wis. 560, 70 N. W. 683, it was said: "The presiding judge of a trial court is charged with the duty of trying the case from the opening to the close, and he ought not to abdicate his functions even for half an hour. * * * We cannot but regard this long absence from the bench during an important part of the trial as an error which calls for a new trial. We feel that we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way to dangerous abuses and break down one of the most valuable safeguards to litigants."

In *People v. McPherson*, 74 Hun. 336, 26 N. Y. Supp. 236, it was held that a criminal case cannot be partly tried before one magistrate and partly before another, and it was there said: "The proposition that a criminal case cannot be partly tried before one magistrate and partly before another seems to me too clear to need argument or citation of authority to sustain it. When the trial of a case is once commenced it must proceed to the end before the same court and jury." In *O'Brien v. People*, 17 Colo. 561, 31 Pac. 230, it was said: "Moreover, the presence of the judge is essential to the organization of a court for the trial of felony cases. If the judge is absent while substantial proceedings, such as the taking of evidence or the argument of counsel, are being carried on in the presence of the trial jury, such proceedings must be regarded as *coram non judge*; and if, as in this case, it affirmatively appears by the bill of exceptions that the judge was absent against the objections of the defendant, his absence must be held ground for reversal." (See, also, *People v. Eckert*, 16 Cal. 110; *State v. Smith*, 49 Conn. 283; *State v. Carnagy*, *supra*; *State v. Beuerman*, *supra*; *Palin v. State*, 38 Neb. 862, 57 N. W. 743.)

While, in the case at bar, there was a judge present on the

bench during all of the trial, yet the judge who heard the evidence, absented himself from the bench before the trial was concluded. The plaintiff in error was entitled to his judgment upon the law and the facts up to the time of the retirement of the jury to consider of their verdict. Hence, when he was absent from the bench, the authorities which hold that absence from the bench is error such as justifies a reversal, are strictly applicable to his conduct. His absence was not excused by the fact that another judge, not familiar with the evidence, instructed the jury and received the verdict. The injury, which may have inured to the interests of the plaintiff in error, was not counterbalanced by the presence of a new and outside presiding officer.

For the reasons above stated, the judgment of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

HEFNER V. STATE.

44 Tex. Crim. Rep. 441—71 S. W. Rep. 964.

Decided January 28, 1903.

TRIAL: *Prejudicial statement of fact made by a juror during the deliberation of the jury—Prejudice presumed.*

1. A statement by one juror to another, made during deliberation, as to the penalty assessed in same case at a previous trial, is presumed to be prejudicial; and is ground for new trial.
2. The verdict being a duplicate of the former verdict, and the court below having accepted as true, evidence of improper reference to the former verdict by one or more jurors, the judgment is reversed.

Appeal from District Court, Erath County; Hon. W. J. Oxford, Judge.

R. A. Hefner, convicted of rape, appeals. Reversed.

Parker, Carlton & Carter, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

BROOKS, J. Appellant was convicted of rape, and given 15 years in the penitentiary.

The fourth bill of exception shows that upon the hearing of

the motion for new trial appellant placed juror N. W. Webb on the stand, who testified as follows: "I was one of the jurors who tried the case of *State v. Hefner*, and upon Friday night prior to Saturday morning, when the verdict was returned, myself and two other jurors were sitting together and alone in a room. The other jurors at this time were in another room. It was rather late at night, but I could not say whether the others had gone to bed or not. The other two jurors who were with me were strangers to me, as I had never seen them before they were impaneled. I think their names were Raney and Havens. I am not positive though, and will not swear that it was Raney and Havens; but I thought at the time, and still think, they were the men. While we were in the room together, the other two jurors were standing up by the window, and I was sitting down on a bed near them. We were all discussing, and trying to see if we could agree on the penalty that should be given the defendant. We disagreed as to the amount that should be given him. One of the jurors was for the low penalty, and the other for a higher penalty. I was for a low penalty myself. While we were discussing the amount that should be given defendant, one of the jurors—I am not sure which one—asked the question, 'I wonder what he got before?' To this question I replied, 'I have heard that he got fifteen years,' when one of the other jurors immediately said, 'We must not discuss that,' and we did not discuss it, or mention the fact of a former trial or conviction any further. The amount of the penalty defendant got before did not in any way influence my verdict. I did not believe defendant ought to have had but five years, as he was thirty-six years old; and, as I had guarded penitentiary convicts a good deal of my life, and knew what they had to go through with, I thought fifteen years was too long. But I afterwards agreed to fifteen years. When we first went out to consider our verdict, myself and two others had doubts about defendant's guilt, and refused to vote he was guilty; but afterwards we agreed he was guilty, and so voted before we separated in the evening, before we returned our verdict the next morning. We did not agree, however, as to the amount of the penalty, until next morning, a few minutes before we returned our verdict."

J. R. Rucker testified that he did not remember hearing the juror Webb say at any time what defendant got on the former

trial, but he may have done so; will not say that he did not, but, if he did, witness did not hear it. "Juror Holmes asked me on Saturday morning while we were discussing the case, what defendant got before. I replied to him that we must not discuss the former trial, but that I could answer him, and do no harm, because I could not tell him that I did not know what he got before. This is the only inquiry about the former trial that I heard while we were discussing the case. When Holmes asked me this question, we had not agreed on the penalty; only on the guilt. When we first went out to consider the case, juror Read and two other jurors, one of whom was juror Webb, expressed doubts about the defendant's guilt, and refused to vote he was guilty. The vote ranged from five to fifty years." Juror Hale testified that he did not hear juror Webb say anything about the former trial. "I did hear some of the jurors, on Saturday morning, before the verdict was returned, and while we were discussing the penalty, ask about a former trial. Did not know what juror it was. As soon as this question was asked, I at once stated that we had nothing to do with the other trial, and the question was not repeated, and I never heard anything further about it from anybody." Juror Raney stated that he did not hear juror Webb say anything about the former trial, nor any one else. After the above testimony was introduced on the motion for a new trial, the court postponed the hearing for one week, and until May 26th. Thereupon the State introduced the following affidavits: Juror Holmes stated that he had heard no discussion by Webb or any other juror about the former verdict. The jurors Carlyle and Bennett's affidavits are to the same effect. Jurors Hope, Fulkenson, Havens, Raney and Stewart each make affidavit as follows: That they did not hear any inquiry from any source concerning a former trial of defendant, while they were discussing the case; did not remember to have heard juror Webb, or any other person, state what defendant got before; did not know what he got on the former trial until after the verdict was rendered and they were discharged; that there may have been inquiries about the former trial, but they did not hear of them. Juror Read testified substantially as did the above jurors, and, among other things, states that Keith "told me this morning that juror Webb, who helped to try the case, had been fined and imprisoned in the county jail; that he

paid no attention to the fact that Webb had been fined, and was perfectly willing to disclose everything that happened while the jury was deliberating, as far as he knew." Bill No. 5 complains that, when the motion for new trial came on to be heard, eight of the jurors who tried said cause were present, and four were absent. The juror Webb testified substantially as heretofore detailed; and, after Webb had so testified, and after all the other seven had testified, as shown by the above statements, the court then announced it would postpone any further hearing of said motion until that day week, in order that the other four jurors could be procured as witnesses. That the other jurors had not been summoned, and were not in attendance. That the court then called all of the eight jurors, including juror Webb, into the jury box. That at the time the said jurors were called into said box quite a number of spectators were in the courtroom. That the court addressed the juror Webb in the presence and hearing of the other jurors and in the presence and hearing of said spectators, and said to juror Webb: "I charged you in this case to consider only the evidence introduced in the trial before you. You have shown by your own testimony that you violated the charge and told other jurors what penalty defendant got upon the former trial. This was contempt of this court, and a violation of law, and I now assess your punishment at a fine of twenty-five dollars, and at imprisonment in the county jail for twenty-four hours; and the sheriff is now ordered to take charge of you, and put you in jail, and keep you there for twenty-four hours, and until said twenty-five dollars is paid. I intend to teach jurors to stay by the record, and obey my instructions; and if I cannot do so I will resign."

As we understand the statement of the learned trial court, he assessed a fine against juror Webb for a discussion or statement of the result of the former trial to the jury. The record also shows that two or more of the jurors asked the question what punishment defendant received on the former trial, to which no answers were given. However, the record shows that the verdict on this trial is a duplicate of that rendered on the former trial, and the statement of the judge indicates to our minds that he believed the juror had discussed or stated the amount of the verdict rendered on the former trial to the jury prior to the time they agreed on their verdict. This being true,

it necessitates a reversal. We cannot speculate as to the effect of such conduct on the minds of the jury. We do not deem it necessary to cite authorities on this question, as it has so often been passed upon by this court. Where such conduct is shown, the only alternative is for this court to reverse.

For the misconduct of the jury, the judgment is reversed, and the cause remanded.

NOTE:—In *Hughes v. State*, 43 Tex. Crim. Rep. 511, 67 S. W. Rep. 104, decided March 5, 1902, in reversing a sentence of 21 years for murder in the 2nd degree, the court said:—

"Appellant contends that he has not had a fair and impartial trial, because the jury trying him during their deliberations discussed the verdict of the former jury that convicted him, and were thereby guilty of misconduct. This is the second trial of defendant, the former trial being reversed on appeal, *Hughes v. State* (Tex. Cr. App.) 60 S. W. 563. When the matter complained of came on for hearing, N. P. Johnson, foreman of the jury, testified. After the jury had determined that appellant was guilty of murder in the second degree, they began to vote on and discuss the punishment to be assessed. Seven of the jurors voted to give him 25 years; three, 15 years; and two, 30 years. It was suggested that, as a majority favored 25 years, the penalty should be assessed at that. At this stage a juror (witness thinks it was Juror Witt, who favored a higher penalty) stated that defendant had been convicted before and given 25 years, and if this jury gave him the same punishment the people would say they were following the other jury. Johnson thereupon stated that, as he remembered it, the other jury had only given him 20 years. This brought on a discussion of the penalty inflicted by the other jury, and most of the jury insisted that the other jury had given appellant 25 years. They seemed to agree that they should not give him the same penalty. Johnson then suggested that they give appellant the benefit of the time appellant had been in jail, and fix the penalty at 23 years. Those jurors who favored 15 years would not consent to 23, but they finally agreed on 21 years. Juror Witt testified that he thought there was something said about the verdict of the other jury. He thought he said something about it himself. Some of the jurors stated the term heretofore given was 20 and some 25 years, did not remember how many thought it was 25. The juror Cogdell testified that he stated appellant had been given 25 years by the other jury, but thought he was the only man who spoke of it; that he thought one said it was 20 years, and some one said it was 25 years. He thinks this last statement was after witness had said it was 25 years. Juror Brown stated that several jurors said, 'Give him 25 years,' when some one said it was like the other trial. One juror said, 'Don't do that; it looks too much like the other trial.' Juror Madewell stated some one of the jurors said the other jury assessed the punishment at 25 years. Juror Green testified that the verdict of the other jury was referred to, some

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saying the penalty assessed was 20 years and some 25 years. Juror Cogdell stated that it would not do to give him 25 years; it looked too much like the other jury. In *Lankster v. State*, 43 Tex. Cr. R. 298, 65 S. W. 373, we decided the exact question here under discussion. In that case one of the jurors mentioned the fact, in the presence of the jury, that appellant had been tried twice before, the first jury giving him 25 years, and the second 15 years, in the penitentiary. Another juror disputed the number of years in the last verdict stating it was only 10 years. In the case at bar all of the jurors testified that the discussion of the former trial did not influence them in making up their verdict. We find the same statement by the jurors in the *Lankster Case*. As stated in the *Lankster Case*: 'We do not believe in a matter of this sort, we are authorized to speculate as to possible injury that may have accrued to appellant. The jury were guilty of misconduct in referring to the former conviction and the bare fact that this misconduct was of a character calculated to injuriously affect him is enough. Under the facts here stated in the bill, the court should have promptly granted a new trial, and should then have set on foot an investigation, and have meted out to those jurors guilty of misconduct a proper punishment. As the matter is presented to us, the record shows a plain violation of our statutes on the subject, which was made to secure a defendant a fair and impartial trial by jury, and no recourse is left us except to reverse the case, and send it back, that it may be tried under the rules of law by a fair and impartial jury.' *Mitchell v. State*, 36 Tex. Cr. R. 278, 33 S. W. 367, 36 S. W. 456; *Terry v. State* (Tex. Cr. App.) 38 S. W. 986; *Darter v. State*, 39 Tex. Cr. R. 47, 44 S. W. 850; *Blocker v. State*, 61 S. W. 391, 2 Tex. Ct. Rep. 69.

"The learned trial judge gave an able, fair, and impartial presentation of the law applicable to the facts in his charge to the jury, and there are no bills of exceptions that require a reversal; in other words, the record is errorless except the misconduct on the part of the jury that appellant complains of. This misconduct is so reprehensible and is so fraught with probable injury to the rights of appellant that we cannot say that it was not calculated to injure his rights. Instead of a fair and impartial judgment by the jury upon the facts and the conclusion from those facts as to the punishment that the law authorized to be meted out to appellant, we have a verdict predicated probably upon the supposed action, in part at least, of a former jury. This is not a fair trial, under the laws of this State, nor is it a deduction from the evidence. We cannot permit such a verdict to stand."

N. B.—This case was again reversed;—44 Tex. Crim. Rep. 296.

In *Blalock v. State* (Texas) 62 S. W. Rep. 571, the judgment of the court below having been affirmed, the court on motion for re-hearing gave the following opinion, on April 17, 1901:

This case was affirmed at our recent Dallas term, 1901. Writ of *certiorari* had been awarded to bring up certain alleged omitted papers. Upon return of the *certiorari* it was shown that the papers were filed at a term of the court subsequent to that at which the conviction occurred,

wherefore said papers were not considered in the disposition of the case. Within the proper time motion for re-hearing was filed, in which it is made to appear that the original papers filed during the term of court at which the conviction was had were lost, but substituted subsequently, and are, therefore, property before the court. Bill of exceptions was reserved to the action of the court overruling the motion for new trial. In this bill it was made to appear by agreement of counsel, sanctioned by the county judge, that after the jury retired, one of that body stated to the others that he had known the State's witness Haynes all his life, as well as his father and mother before him, and that he was a truthful man, etc. This testimony was not before the jury from any of the witnesses during the trial. One of the jurors also stated that Wagoner, a witness for defendant, was under indictment for horse theft, and was unworthy of belief. It appears from the bill of exceptions that the issue was sharply contested in this (a local option) case whether Haynes secured the whisky from defendant on prescription. Haynes testified that he did not, and various witnesses for defendant, in effect, that he did. It is clear the testimony was additional to that admitted during the trial, and was rather strongly in support of the State's case, as it sustained the good character for truth and veracity of the State's witness, and showed the bad character in that respect of one of the defendant's witnesses. This entitled appellant to a new trial, and court below should have awarded it. The motion for re-hearing is granted; and for the error indicated the judgment is reversed, and the cause remanded.

BROOKS, J., absent.

STATE V. BURTON.

65 Kan. 704—70 Pac. Rep. 640.

Decided November 8, 1902.

TRIAL: *Prejudicial statements of fact made by juror, during deliberation—Testimony of jurors regarding such matter—Sheriff usurping functions of sworn bailiff—Separation of jury—Juror sleeping with a brother of the deceased.*

1. When a juror in a capital case makes a statement to his fellow members about material matters outside the evidence, and of a prejudicial character, based on his personal knowledge, it will vitiate the verdict, unless a clear showing is made that the defendant suffered no prejudice from the misconduct.
2. While the law allows a separation of the jury, with the permission and under proper admonition of the court, until a final submission of the case, if it appears that enemies or friends of the accused will endeavor to influence the jury, or that jurors, in commingling with the public during the trial, will be exposed to improper extraneous influences, or be affected by the passions or prejudices existing out-

side the courtroom, it is within the province and duty of the court to keep the jury together under the restraining supervision of an officer during the trial.

(Syllabus by the court.)

In banc. Appeal from District Court, Marion County; Hon. O. L. Moore, Judge.

Robert H. Burton, convicted of murder, appeals. Reversed.

Keller & Dean, for the appellant.

A. A. Godard, Attorney General, and *R. L. King*, for the State.

JOHNSTON, J. Robert Hawthorn Burton was informed against, tried, and convicted of murder in the District Court of Marion County. On a former trial he was convicted of murder in the first degree, but on appeal the judgment of conviction was set aside for errors committed, and a new trial was awarded. *State v. Burton*, 63 Kan. 602, 66 Pac. 633. The principal facts of the homicide are related in the report of the former appeal, and a restatement of them here is not necessary.

On this appeal the main and controlling considerations assigned for reversal arise upon the irregular actions of the jurors, and of those near to and in control of them. In behalf of the defendant it is said that unusual interest was taken by the people of the community in the trial and its result, and especially in the second trial, and that, to avoid any improper influences upon the jury from commingling with the people, who had decided opinions in regard to the killing of Hoffman, or who had especial interest in securing the conviction of the defendant, counsel requested the court to have the jury kept together under charge of a sworn officer, during the trial; but the request was refused. In our State the law allows a separation of the jury, with the permission and under proper admonition of the court, until a final submission of the case. There are cases where the court, in its discretion, may well order the jury to be kept together, and away from the excitement and prejudices of the community, from the beginning of the trial. If there is danger that the enemies or friends of the accused will endeavor to reach and influence the jury, or that the jurors, in commingling with the public during the trial, will be exposed to improper extraneous influences, or be affected by the passions and prejudices existing

outside of the courtroom, it would be the duty of the court to keep the jury together under the restraining supervision of an officer, and beyond the reach of the outside parties and influences. Believing that such dangers existed in this case, the defendant requested that the jury be kept together during the trial under the care of a bailiff duly sworn.

It is charged, and the testimony offered on the motion for a new trial showed, that three brothers of the deceased, Hoffman, who attended the trial, as well as certain witnesses for the State, took occasion to mingle with and make themselves agreeable to the jury at every recess and adjournment of the court, and that when friends or attorneys of the defendant approached them the conversations with the jurors would cease, so that it was difficult to learn what they were saying to the jurors, but they appeared to be holding private and confidential conversations with the jurors. One of the strange things in the case was the fact that William Hoffman, one of the brothers of the deceased, who had come from Colorado to attend the trial, although not a witness, roomed and slept a night with one of the jurors after the trial commenced. The juror had been assigned to another room, but for some reason was changed to the room occupied by Hoffman. They had conversation together, but the juror stated that the facts of the case were not discussed, and he further stated that he was not aware that his room-mate was a brother of the man who was killed by Burton. There was no proof to show that William Hoffman offered to treat two of the jurors to drinks of malt ale at his expense, but they declined the offer. During the deliberations of the jury, the sheriff and a deputy of his, neither of whom were sworn as bailiffs in the case, entered the jury room, and held some conversation with the jurors, although nothing was said of the pending case. The occasion for their going was that the court had directed the sheriff to furnish supper for the jury to the bailiff. Instead of allowing the bailiff to take the food to the jury, they carried it into the jury room, and one of them states the jurors "jollied" them about the supper that was furnished. Misconduct of a more serious character occurred during the deliberations of the jury.

The crucial point in the case was whether there was a necessity, or an apparent necessity, for the shooting of Hoffman. It was claimed by the defendant that Hoffman was a violent

and desperate man, who had threatened the life of the defendant. One of the jurors stated to his fellows that he knew that Hoffman was nothing but a bluffer, and that he would not have hurt anybody. A similar statement appears to have been made by another of the jurors, and those were not based on the testimony in the case, but rested upon personal knowledge. Another juror stated in the jury room that a former jury had found the defendant guilty of murder in the first degree, and there was no reason why a different verdict should be rendered now. And there was further testimony that a juror stated to his fellows that everybody in Marion believed the defendant to be guilty of murder in the first degree. Several of the jurors testified positively that these extraneous and prejudicial statements were made. It is true that a greater number of the jurors testified that they did not make them, or hear them made, but they coupled with it the further statement that such statements might have been made in the jury room, but, if so, they did not think they were based on the personal knowledge of the jurors.

We think the State wholly failed to meet the positive testimony that the prejudicial statements of an evidentiary nature were made, and in such a case the burden rests on the State to prove that the defendant suffered no prejudice from misconduct and improper influences. It is true the jurors testified that they were not affected by the statements and extraneous influences, but that kind of testimony is hardly sufficient in a case involving the liberty of a prisoner for life. Jurors will generally hold the opinion—and honestly, too—that they are not prejudiced by improper influences; but who can say that these statements, based on the personal knowledge of their associates, did not unconsciously influence their judgment and action? And who can say that they were not affected by the information wrongfully introduced in the jury room that another jury had at another time found the defendant guilty of the highest degree of the crime with which he was charged? Nor is it easy to show that the defendant suffered no prejudice from the testimony from the outside that the public of Marion believed he was guilty of murder in the first degree.

It is the aim of the law to surround a trial by such safeguards as will exclude all external and improper influences from the

jury, and thus protect the rights of the defendant and prevent the conviction of the innocent. It has been said that:

"We cannot be too strict in guarding trials by jury from improper influences, and in compelling a rigid and vigilant observance of all the provisions of the statutes tending to preserve the purity of such trials. The verdict, when returned into court, must command entire confidence. It must be secure from all improper bias, and even from the suspicion of improper bias." *State v. Snyder*, 20 Kan. 306.

When jurors in their zeal to secure a finding of guilty against the accused, bring before their fellows material statements and facts based on personal knowledge, and which were not given in evidence, confidence in their verdict is necessarily shaken. If such matters had been admitted in evidence in court, where the defendant had opportunity to meet and disprove them, it would have been reversible error; and where they are introduced before the jury when the defendant is absent, and without opportunity to challenge or meet them, they are still more hurtful and erroneous. In the nature of things, these extraneous statements were very prejudicial, and, as they were not shown to be without prejudice to the defendant, they necessarily vitiate the verdict and require a new trial. *Railroad Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *Same v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341. This error, although sufficient of itself to accomplish a reversal, is somewhat emphasized by other irregularities and misconduct which have been mentioned. Some of them were manifestly without prejudice, while as to others it is not so easy to say that the jury was free from impartial influences, or that the defendant suffered no prejudice from them.

While we are reluctant to set aside a second conviction, we cannot sanction a verdict in a capital case surrounded with so many opportunities for improper influences, and where extraneous and prejudicial facts and statements were put before the jury while they were determining the rights of the defendant to life and liberty.

The judgment of the District Court will be reversed, and the cause remanded for a new trial.

SMITH, CUNNINGHAM, GREENE, and BURCH, JJ., concurring.

OSTER, C. J. While I concur in the judgment of reversal in this case, I only do so as to the first ground, namely, prejudicial statements by jurors to their fellows in the jury room, for the reason that the evidence in court of the jurors as to the making of such statements in the jury room was admitted without objection. To my mind, the practice of allowing jurors to expose the secrets of the jury room and relate matters occurring there which may have influenced their verdict, while sanctioned in such cases as this by former decisions, is radically wrong. It is allowing jurors to impeach their verdict as to matters inhering in it, and it should not be permitted.

POLLOCK, J. My sentiments also.

STATE v. LOWE.

67 Kan. 183—72 Pac. Rep. 524.

Decided May 9, 1903.

*TRIAL: Prejudicial statements in jury room by one of the jurors—
Prejudicial effect presumed—Defendant may testify as to his intention.*

1. A new trial for misconduct of the jury should be allowed where a juror of his own personal knowledge states to his associates, while deliberating on their verdict, facts prejudicial to the defendant which are not in the testimony unless it is shown that the defendant suffered no prejudice from the misconduct.
2. The defendant, who was charged with the larceny of property, and who claimed to have taken the same by mistake, may testify directly as to his intention in the taking of the property.
(Syllabus by the court.)

Appeal from the District Court, Phillips County; Hon. John R. Hamilton, Judge.

J. O. Lowe convicted of larceny, appeals. Reversed.

William Kingery and Mahin & Mahin, for the appellant.

C. C. Coleman, Attorney General, and *T. M. Sullivan*, for the State.

JOHNSTON, C. J. J. O. Lowe was convicted of the larceny of two loads of hay, of the value of \$8. That the hay was taken was not denied, but it is claimed to have been taken by mistake. Lowe employed two men with teams to go from Phillipsburg some distance into the country and bring in two

loads of hay. He indicated to them the location of the hay, and directed them to make inquiries in the neighborhood where the hay could be found. He followed them, and reached the haystacks about the time of their arrival, and assisted them in loading it. The hay belonged to John Cox, and was taken from his land, while the hay intended to be taken, as claimed by Lowe, was on the land of Frank Case in the same neighborhood, and of which Lowe had control. The owner of the hay followed the teams into Phillipsburg, and upon arrival caused the arrest of Lowe.

On the part of the defendant it is contended that all the circumstances point to an innocent taking. The teams were sent in the daytime, they were directed to make inquiries of the people in the neighborhood as to the hay, there was no concealment, he had hay on the Case land close to that which was taken, the country in the vicinity of the hay was rough and broken, and the division lines between the tracks could not be easily located, and, when informed that Cox's hay was taken, Lowe acknowledged there might be a mistake, and offered to pay for the hay.

Passing the question as to whether the evidence showed a criminal intent on the part of Lowe, the first point is the ruling of the court in striking out the testimony of the defendant as to his intent. He was asked if he intended to steal the hay, and answered, "I did not have any idea of it. I paid the haulers \$2 apiece, or \$4 for hauling the hay from over there." On motion of the court this testimony was stricken out. He was a competent witness to testify as to what his intentions were with respect to the taking of the hay. *State v. Kirby*, 62 Kan. 441, 63 Pac. 752. The last part of the answer, with respect to paying for the hauling of the hay, although not entirely responsive, tended to explain his purpose, and is not sufficiently objectionable to justify the striking out of the whole statement.

A more serious objection, however, was the misconduct of a juror in the jury room during the deliberations. W. H. Smith, who had stated on his *voir dire* that he had no knowledge of the case nor prejudice which would prevent him from giving the defendant a fair trial, made statements to other jurors which greatly reflected on the character and conduct of the defendant. He told them that Lowe was guilty of another offense; that he had shot a man at one time, and that it had cost the county

\$2,800; that he was a bad man, who should not be turned loose, but should be convicted. These and similar statements he pressed upon the jurors as arguments in favor of conviction. No testimony of this character was introduced, nor could it have been introduced, on the trial. Such statements, asserted as matters of personal knowledge of a juror, would in the nature of things tend to prejudice the defendant, and, as there was no showing made by the statement that they were without prejudice, it must be regarded as prejudicial error. *State v. Burton*, 65 Kan. 704, 70 Pac. 640; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341. There was no attempt on the part of the State to meet this testimony, or show that it did not result in prejudice to the defendant. The testimony as to the criminal intent is rather slight, and we cannot say that the verdict was not influenced by the misconduct.

The judgment will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

BOOKER V. STATE.

81 Miss. 391—33 So. Rep. 221.

Decided January 12, 1903.

TRIAL: Witness examined in absence of defendant.

Upon convening of court after the noon recess, a witness who saw the homicide, was examined in chief, and three questions asked on cross-examination, when the court discovered that the defendant was absent, and arrested the proceedings until the defendant was brought from the jail, and then over his objection, the trial proceeded, the evidence being again given, and the jury admonished not to regard any evidence given in defendant's absence. Held, reversible error.

Appeal from Circuit Court, Coahoma County; Hon. Sam. C. Cook, Judge.

John Booker, Jr., convicted of murder, appeals. Reversed.

J. W. Cutrer, for the appellant.

Wm. Williams, Assistant Attorney General, for the State.

CALHOUN, J. On the reassembling of the Circuit Court after

the noon recess, the examination of a State witness was resumed in the absence of the prisoner, who was on trial on an indictment for murder. The testimony of this witness, who saw the homicide, was quite important, and his examination in chief lasted for a time sufficient to take up three pages of typewritten record paper for the transcription of the notes of the stenographer. The examination in chief of the witness was concluded by the State, and three questions had been asked him by counsel for the prisoner, when the court discovered that the accused was not present, and thereupon the presiding judge stopped the proceedings until the sheriff brought him from the jail. Then the court told the jury not to consider anything said by the witness in the absence of the prisoner, and directed the trial to proceed, over the objection of the prisoner, who excepted, and the witness was re-examined *de novo* and cross-examined, giving substantially the same testimony as he had delivered in the absence of the defendant. This action of the court is one of the grounds of a motion for a new trial filed by the prisoner, which motion was overruled, and in this we think there is fatal error. The prisoner had the constitutional right to be present, and formerly it was uniformly held that a conviction was void unless the record affirmatively showed his presence. Now, under the statute, his presence is presumed, unless, as in this case, the record shows his absence. The authorities cited in the brief of counsel for appellant are conclusive of the question. The Attorney General, with commendable frankness and fairness, concedes it, and, with a proper and high conception of his real duty as an officer, himself produces a case, the facts of which are precisely the same as in the case before us. *State v. Greer*, 22 W. Va. 801. In that case the court said: "We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross-examination of the witness in his absence. He had the right to be present, which he did not and could not waive. He had the right to observe every look, gesture, or movement of the witness while he was testifying, and it matters not that the court excluded the evidence and certified that it was repeated in his presence." In the case in hand, we think the court below should have offered to the prisoner that a mistrial should be entered, and a *venire de novo* ordered. If this had been done and refused, perhaps

the trial might well have proceeded, but that case is not before us. As it is, the new trial should have been granted.

Reversed and remanded for a new trial.

NOTE (By J. F. G.).—If tendering to the defendant a mistrial in case of error of this kind is permissible, is it not in the power of the prosecution, when temporarily failing in proof, to entrap the defendant into consenting to a continuance, by causing some prejudicial irregularity to occur in his absence? Has not the defendant the right to proceed with the trial, demanding an acquittal with the certainty of a new trial, if he does not succeed? Must he be compelled to accept a mistrial or waive a constitutional right?

A WEST VIRGINIA CASE:

Similar to the *Booker Case* is *State v. Sheppard*, 49 W. Va. Rep. 582, (611), 39 S. E. Rep. 676; decided September 7, 1901. In that case the court said:

"The next ground of complaint is that the following testimony was given by a witness for the State in the absence of the prisoner:

"Q. What is your name, please?"

"A. Flora Ayers."

"Q. What is your husband's name?"

"A. Jont Ayers."

"The court certifies that while these questions were asked and answered the prisoner was not in the court house, but was then in the jail, and was afterwards brought into court, and then the prosecuting attorney asked the witness the same questions, and to them she gave the same answers, but that the witness was not sworn in the presence of the prisoner. The absence of the prisoner was noticed by the court, and the trial was suspended until he was brought in. No objection or exception was taken at the time, but, after the verdict was brought in, the prisoner moved the court to arrest the judgment and set aside the verdict because he was not in the court during all the trial, which motion the court overruled. This was a fatal error, for which the judgment must be reversed, the verdict set aside, and a new trial granted. In *Bish. Cr. Proc.* § 687, it is said: 'The prisoner cannot be deprived of his right to be present at all stages of the trial.' The same author says, at section 688. 'In a case of felony or treason, the prisoner must be present during the whole of the trial, including the giving in of the evidence and the rendition of the verdict.' In *Andrews v. State*, 2 Sneed, 550, it was held that 'in criminal cases of the grade of felony, where the life or liberty of the accused is imperiled, he has the right to be present, and must be present, during the trial and until the final judgment.' In *Crump's Case*, 1 Va. Cas. 172, it was held 'that in no case whatever, except where some statute hath otherwise directed, must judgment of imprisonment or unusual corporal punishment be rendered, unless the defendant be present in court.' It was held in *Sperry's Case*, 9 Leigh, 623, and *Hooker's Case*, 13 Grat. 763, that it is absolutely necessary to a valid conviction that the prisoner shall be present

in court when anything is done in any way affecting his interest. A leading Virginia case on this subject is *Jackson's Case*, 19 Grat. 656. There, after the evidence was closed and the jury had retired, they came back into court and the court permitted a portion of the testimony of one of the witnesses, as taken down during the trial, to be read to them, at their request, in the absence of the prisoner as well as of the witness. During the reading of the notes the prisoner was brought back into court, and afterwards the witness, being then present, was re-examined by consent of all parties. This was held to be sufficient cause for setting aside the verdict, and upon this state of the case Judge Dorman, after quoting from several authorities, says: 'These are citations sufficient to show the strict adherence to the rule in all trials where the life and liberty of the accused is in jeopardy. The law is made for the protection of the citizen, and all alike are amenable to its penalties and entitled to its immunities. Whatever may be the turpitude of his offense, however great his criminality, every man has a right to an impartial trial according to law, and, till found guilty by his peers, that law presumes him innocent, and gives him the right to be present to see and know all that is said or done by the court affecting his case. From reason and authority it seems to be clear that the court erred in permitting any part of the testimony taken down to be read over to the jury in the absence of the accused.' In this opinion the following is quoted from *Wade v. State*, 12 Ga. 25, and approved: 'The court has no more authority under the law to read over testimony to the jury affecting the life or liberty of the defendant in his absence than it has to examine the witnesses in relation thereto in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be present, and see and hear all the proceedings which are had against him on the trial before the court. It is said the presumption must be that the court read the testimony correctly, and read over all that was declared against the defendant; therefore he was not injured. The answer is, it was the legal right and privilege of the defendant to have been present in court when this proceeding was had before the jury in relation to the testimony delivered against him; and he is to be considered as standing upon all his legal rights, waiving none of them.'

"Upon this question the decisions of this court have been uniform, and have enforced this rule with all the rigidity and strictness that characterize the Virginia decisions. Thus, in *Younger's Case*, 2 W. Va. 579, it was held: 'A prisoner indicted for felony must be personally present during the trial therefor, and the record can alone be looked to for the evidence to prove such presence at every stage of the trial.' In *Conkle's Case*, 16 W. Va. 736, this court held that a person indicted for felony must be personally present during the trial, and such presence must be shown by the record. See, also, *Sutphin's Case*, 22 W. Va. 771. The very question we have here arose in *Greer's Case*, 22 W. Va. 800. In that instance the prisoner, by permission of the court, retired in charge of the jailer, and, upon the prisoner's request, the jailer put him in his cell, without the knowledge of the court or the counsel on either side, and then returned to his seat in the court room. The court and counsel, not observing the

absence of the prisoner, and supposing he had returned with the jailer, proceeded with the cross-examination of a witness, and two questions were asked and answered before it was discovered that the prisoner was absent. The examination of the witness was immediately stopped, the jury were instructed to pay no attention to the evidence introduced in the absence of the prisoner and same was ruled out, and when the prisoner returned the same questions were put to the witness and the same answers received from him. This court held in that case that the court below erred in refusing to set aside the verdict because of the absence of the prisoner while a part of the evidence was being introduced. Johnson, P., quotes and approves the strongest part of the opinion in *Jackson's Case*, and then says: 'We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross-examination of the witness in his absence. He had the right to be present, which he did not and could not waive. He had the right to observe every look, gesture, or move of the witness while he was testifying; and it mattered not that the court excluded the evidence and certified that it was repeated in his presence.' From these authorities it is clearly a matter of no consequence that the evidence introduced in this case in the absence of the prisoner may not have affected him, and that he did not at the time take an exception. To be present during every part of the trial was a constitutional right which he could not waive. Until this time, this court has not only held that the right could not be waived, but also that such an error cannot be cured. *Greer's Case, Supra.*"

TURNER V. STATE.

118 Ga. 756—45 S. E. Rep. 798.

Decided October 24, 1903.

TRIAL: *Prejudicial remarks of the Judge as to the weight of evidence of good character in the trial of a gaming case.*

FISH, P. J. 1. It is cause requiring the grant of a new trial for the judge, on the trial of a gaming case, when admitting to the jury evidence of the good character of the accused, to say, in effect, that, while evidence of good character is admissible in all criminal cases, in his opinion it does not illustrate the issue, or amount to much, in a gaming case. Civ. Code, § 4334; *Wannack v. Macon*, 53 Ga. 162 (3); *West v. Black*, 65 Ga. 647 (2); *Southwestern R. R. v. Papot*,* 67 Ga. 675 (8). Where, in *certiorari*, error was assigned upon such intimation of the trial judge of his opinion as to the probative value of testimony, the overruling of the *certiorari* was erroneous. (Syllabus by the court.)

* 118 Ga. erroneously gives name as Philpot.—J. F. G.

Certiorari. Before Judge Evans, Putnam Superior Court,
July 13, 1903. Reversed.

W. T. Davidson, for the plaintiff in error.

J. E. Pottle, Solicitor General, and *S. T. Wingfield*, *contra*.

Judgment reversed.

All the Justices concurring.

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old English cases, treating on topics as indicated in brackets, as follows:—indictment for burglary, conviction for larceny (89); curtilage, what is and what is not within, out-house, goose-house etc. (89, 90, 91); dwelling-house—what it is—two cases (92); inhabitation of house (93); servant's apartments (94); breaking and entering—what is and what is not—cutting hole through shutters, reaching in, and removing goods (95); removing fastening and introducing hand (97); raising partly open sash (98); throwing up window, forcing shutter, etc., (98); introducing hand between outer and inner shutters (99); pressing

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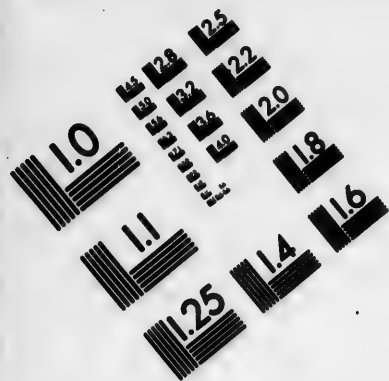
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